Docket for 02-1377

No. 02-1377 Status: GRANTED
Title: Buck Doe, et al., Petitioners
v.
Chao, Secretary of Labor
Docketed: March 20, 2003
Lower Ct: United States Court of Appeals for the Fourth Circuit
Case Nos.: (00-2292)
Decision Date: September 20, 2002
Rehearing Denied: November 15, 2002

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Jan 17 2003	Application (02A590) to extend the time to file a petition for a writ of certiorari from February 13, 2003 to March 15, 2003, submitted to The Chief Justice.
Jan 23 2003	Application (02A590) granted by The Chief Justice extending the time to file until March 15, 2003.
Mar 14 2003	Petition for writ of certiorari filed. (Response due April 21, 2003)
Apr 16 2003	Order extending time to file response to petition to and including May 21, 2003.
May 19 2003	Order further extending time to file response to petition to and including May 29, 2003.
May 29 2003	Brief of respondent Chao, Secretary of Labor in opposition filed.
Jun 3 2003	Reply of petitioners Buck Doe, et al. filed.
Jun 27 2003	Petition GRANTED.
Jul 24 2003	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including August 25, 2003.
Aug 25 2003	Brief of petitioner Buck Doe, et al. filed.
Aug 25 2003	Joint appendix filed.
Aug 25 2003	Brief amicus curiae of Linda R. Tripp and the National Whistleblower Center filed.
Aug 25 2003	Brief amicus curiae of Electronic Privacy Information Center, et al. filed.
Sep 16 2003	Extension of time within which to file respondent's brief on the merits to and including October 29, 2003.
Sep 24 2003	SET FOR ARGUMENT Wednesday, December 3, 2003
Sep 25 2003	CIRCULATED.
Oct 2 2003	Brief amicus curiae of Reporters Committee for Freedom of the Press filed. Distributed).
Oct 10 2003	Record received from the U.S.C.A. for the 4th Circuit. (1 volume.)
Oct 22 2003	Record received from the U.S.D.C. for the Western District of Virginia. (1 box)
Oct 29 2003	Brief of respondent Chao, Secretary of Labor filed. (Distributed)
Nov 14 2003	Reply of petitioner Buck Doe filed. (Distributed)

Supreme Court, U.S.
FILED

021377 MAR 14 2003

OFFICE OF THE CLERK

No. ____

IN THE

Supreme Court of the United States

BUCK DOE,

Petitioner,

v.

ELAINE L. CHAO, SECRETARY OF LABOR,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an individual who has suffered an "adverse effect" as a result of a federal agency's "intentional or willful" violation of the Privacy Act, 5 U.S.C. § 552a *et seq.*, must further prove that he has suffered "actual damages" to be entitled to the minimum statutory damages award of $1,000 available under Section 552a(g)(4) of the Act.

PARTIES TO THE PROCEEDINGS

The parties to the proceeding below were Buck Doe, Robert Doe, Tays Doe, Otis Doe, Thomas Doe, Joe Doe, Charles Doe, and the United States Department of Labor. Each of the Doe parties are individuals, and none has any related corporate entities.

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PETITION FOR A WRIT OF CERTIORARI

Buck Doe petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-60a) is reported at 306 F.3d 170. The opinion of the district court (App. 61a-68a) and the report and recommendation of the magistrate judge (App. 69a-104a) are unreported.

JURISDICTION

The district court had jurisdiction under 5 U.S.C. § 552a(g)(1). The court of appeals had jurisdiction under 28 U.S.C. § 1291. The court of appeals entered its judgment on September 20, 2002, and denied petitioner's motion for rehearing and suggestion of rehearing *en banc* on November 15, 2002. App. 1a-2a. On January 23, 2003, Chief Justice Rehnquist, as Circuit Justice for the Fourth Circuit, granted petitioner's motion for extension of time to file a petition for a writ of certiorari up to and including March 15, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Privacy Act, 5 U.S.C. § 552a *et seq.*, are set forth in the appendix. App. 105a-106a.

STATEMENT

Section 552a(g) of the Privacy Act of 1974 provides that the "United States shall be liable" to an "individual" who proves that an agency's "intentional or willful" disclosure of private information contained in a "system of records" caused him an "adverse effect." 5 U.S.C. §§ 552a(g)(1)(D), (g)(4). The measure of liability is "the sum of" "actual damages sustained by the individual . . . but in no

case shall a person entitled to recovery receive less than the sum of $1,000" and "the costs of the action together with reasonable attorney fees as determined by the court." *Id.* § 552a(g)(4)(A) & (B). This case presents the question of whether an award of $1,000 statutory damages under the Act is conditioned upon the individual's proof of some "actual damages." At stake is the Privacy Act's viability as a mechanism to protect individuals against federal agencies' disclosure of sensitive, private information.

1. Statutory and Regulatory Background

The Privacy Act of 1974 protects individuals' "personal and fundamental right" of privacy by "regulat[ing] the collection, maintenance, use, and dissemination of information by [federal] agencies." Pub. L. 93-579 §§ 2(a)(4), 2(a)(5), 88 Stat. 1896. Except pursuant to enumerated exceptions, an agency may not "disclose any record which is contained in a system of records by any means of communications to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains . . . ." 5 U.S.C. § 552a(b). The Act affords individuals a right to review and, where appropriate, demand amendment of agency records that are not accurate, relevant, timely, or complete. *Id.* § 552a(d)(1)-(3). The Act also stringently regulates the manner by which an agency may collect and maintain information about individuals. *Id.* § 552a(e).

Congress enacted the Privacy Act out of concern that "the privacy of an individual is directly affected by the collection, maintenance, use, and dissemination of personal information by Federal Agencies." Pub. L. 93-579 § 2(a)(1). Advances in computerization had "greatly magnified the harm to individual privacy that can occur from any collection, maintenance, use, or dissemination of personal information." *Id.* § 2(a)(2). The

potential harms include impairment of "opportunities for an individual to secure employment, insurance, and credit, and . . . right to due process." *Id.* § 2(a)(3). Congress specifically condemned federal agencies' frequent use and disclosure of social security numbers as "one of the most serious manifestations of privacy concerns in the Nation." S. Rep. No. 93-1183, at 28 (1974), *reprinted in* Comm. on Gov't Operations U.S. Senate and Comm. on Gov't Operations House of Representatives, *Legislative History of the Privacy Act of 1974 S. 3418 (Public Law 93-579) Source Book on Privacy*, 151, 181 (1976) [hereinafter "*Source Book*"]; *see* Pub. L. 93-579 § 7.

Congress intended that a private right of action under the Privacy Act be "designed to encourage the widest possible citizen enforcement through the judicial process." S. Rep. No. 93-1183, at 83, *reprinted in Source Book* at 236; *see also* H.R. Rep. No. 93-1416 at 15 (1974), *reprinted in Source Book* at 294, 308 ("best means" to enforce the Act is "constant vigilance of individual citizens backed by legal redress"). Accordingly, Congress subjected agencies "to civil suit for any damages which occur as a result of willful or intentional action which violates any individual's rights under [the] Act." Pub. L. 93-579 § 2(b)(6).

Section 552a(g) sets forth the Act's civil remedies provisions. Section 552a(g)(1)(D) provides a private right of action for, among other things, wrongful disclosures of information:

> Whenever an agency . . . fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual, the individual may bring a civil action against the agency, and the

district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.[1]

Section 552a(g)(4) further defines and measures the United States' liability in such suits:

> In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of —
>
> (A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and
>
> (B) the costs of the action together with reasonable attorneys fees as determined by the court.

5 U.S.C. § 552a(g)(4)(A).

The Act's legislative history describes Section 552a(g)(4)(A)'s $1,000 statutory damages clause as "liquidated damages . . . [to be] assessed against the agency for a violation of the Act." *Source Book* at 768 (report of "technical and substantive committee amendments"); *see also* H.R. Rep. No. 93-1416, at 38, *reprinted in Source Book* at 330 (pre-amendment view of various House members that the Act should "at the very least" contain a "liquidated damages" provision).

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[1] Sections 552a(g)(1)(A) and (g)(1)(B) allow suits for injunctive relief where an agency fails to amend an inaccurate record or fails to provide access to records, respectively. *See* 5 U.S.C. §§ 552a(g)(1)(A), (g)(1)(B), (g)(2), and (g)(3). Section 552a(g)(1)(C) allows damages suits for failure to properly maintain an accurate record that forms the basis of an "adverse" determination. *See id.* §§ 552a(g)(1)(C), (g)(4).

The Office of Management and Budget ("OMB"), tasked to "develop guidelines and regulations for the use of agencies in implementing the provisions of [the Act]", Pub. L. 93-579 § 6, promulgated Privacy Act Guidelines only months after the Act was passed. The Guidelines construe Section 552a(g)(4) to mean:

> When the court finds that an agency has acted willfully or intentionally in violation of the Act in such a manner as to have an adverse effect upon the individual, the United States will be required to pay
>
> – actual damages or $1,000, whichever is greater
>
> – court costs and attorney fees.

40 Fed. Reg. 28,948, 28,970 (July 9, 1975).

2. The Litigation Below

The Department of Labor ("Department") administers claims brought pursuant to the Black Lung Benefits Act of 1981, 30 U.S.C. § 901 *et seq*. App. 5a. The Department's application form asks claimants to provide their social security numbers, which the Department uses as claim identifiers. *Id*. Administrative law judges (ALJs) routinely distribute hearing notices identifying multiple black-lung claims by social security number. *Id.* ALJs also routinely caption benefits decisions with claimants' social security numbers and release them for publication. As a result, claimants' social security numbers were widely disclosed. App. 5a-6a. The existence and operation of these policies are undisputed. App. 63a, 70a-71a, 82a.

In February 1997, Buck Doe and several other black-lung benefit claimants brought Privacy Act suits against the Department in the United States District Court for the Western District of Virginia. The suits were brought pursuant to Section 552a(g)(1)(D), and each sought $1,000 statutory damages under

Section 552a(g)(4)(A). App. 5a-6a, 82a-83a. Immediately after Doe filed suit, the Department consented to an order barring disclosure of claimants' social security numbers on hearing notices or other documents. *Id.* Doe and the other plaintiffs then moved to certify a class of claimants, and the parties cross-moved for summary judgment. *Id.* The district court referred the matter to a magistrate judge for report and recommendation. *Id.*

The magistrate judge received evidence and conducted hearings. In a sworn affidavit and in testimony, Doe attested that the Department's disclosure of his social security number caused him significant emotional distress, specifically fear that someone would fraudulently use his name and social security number. App. 75a-76a.

The magistrate judge found that there was "little, if any dispute in the facts at issue in this case," and the "issues to be determined, therefore, are whether the undisputed facts prove that the Department violated the Privacy Act and whether the Plaintiffs are entitled to damages." App. 82a. The magistrate judge concluded that: (i) social security numbers are "records" held by the Department in a "system of records" under the Privacy Act, App. 86a; (ii) Doe had not consented to the Department's disclosure of his social security number, App. 87a-88a; (iii) no exception to the Privacy Act's restrictions excused the Department's disclosure, App. 88a-92a; (iv) as a result of the disclosure, Doe had suffered the "adverse effect" of emotional distress, App. 93a-94a; (v) "undisputed evidence" proved the Department's actions "intentional and willful," App. 96a-97a; and (vi) Doe's evidence of emotional harm could trigger at least "the statutory damages provided for in the Act" and, thus, the Department was not entitled to summary judgment. App. 99a-100a.[2]

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[2] The magistrate judge recommended granting the Department summary judgment on the other plaintiffs' claims because none had produced

The district court accepted the magistrate's report in part and rejected it in part. App. 61a-62a. It held that Doe had proven the "elements essential to prevail on a claim for damages under the Privacy Act." App. 66a. It further held that Doe's "incontrovertible evidence" of "emotional distress as a result of the Department disclosing his social security number to parties not specifically involved in his black lung claim" was sufficient to "allow[] granting summary judgment in his favor" for the "statutory minimum amount of $1,000 . . . provided by 5 U.S.C. § 552a(g)(4)(A) . . . ." App. 66a-67a.

A split panel of the Fourth Circuit reversed. The court framed the issue on appeal as "whether a person must suffer 'actual damages' in order to be considered 'a person entitled to recovery' within the meaning of section 552a(g)(4)(A), and therefore entitled to the statutory minimum of $1,000 under that section." App. 9a. Relying on "several reasons, perhaps no one of which alone would be dispositive," the court held that "a person must sustain actual damages to be entitled to the statutory minimum damages award." *Id.* It acknowledged, however, that this interpretation was "not strictly compelled by the statute's language" and that the decision deepened a split of authority among the circuits. App. 12a-13a & n.3.

The decision below rested on rationales deemed convincing in the "aggregate." App. 9a. *First*, "as a matter of statutory

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sufficient evidence of adverse effect. App. 100a. The magistrate judge also recommended denial of class certification because named plaintiffs' claims were not "typical" of class claims as defined in the complaint. App. 79a-81a. The district court accepted these recommendations, App. 61a-62a, and the Fourth Circuit affirmed. App. 21a-23a. The resolution of these separate issues has no bearing on the question presented in this petition, and they are not before this Court. Accordingly, in the remainder of this petition, Doe discusses only those rulings and issues relevant to his individual Privacy Act claim.

interpretation" Section 552a(g)(4)(A)'s juxtaposition of the phrases "person entitled to recovery" and "actual damages" "indirectly" defined "'recovery' . . . by its express limitation of the Government's liability to actual damages sustained." *Id.* (emphasis omitted). *Second*, this proximity "establishe[d] as a grammatical matter" that "a person entitled to recovery" references "one who is able to show actual damages." App. 10a (emphasis omitted). *Third*, placement of the conjunction "but" between Section 552a(g)(4)(A)'s clauses "reinforce[d] the conclusion that the second clause . . . adds a qualification with respect to the class of plaintiffs defined by the first . . . ." *Id. Fourth*, "Congress, with ease, could have phrased the liability provision to provide unequivocally for a statutory minimum recovery, even for those who are unable to prove actual damages." App. 11a. *Finally*, the court conceded its interpretation "is not strictly compelled by the statute's language," but reasoned that because the Privacy Act is a "limited waiver of sovereign immunity," Section 552a(g)(4)(A) must be "strictly construed." App. 13a-14a. The court then held that Doe's proof of emotional harm was not sufficient to establish "actual damages" under the Act, reversed the district court, and remanded with instructions to enter summary judgment for the Department. App. 14a-18a.

Judge Michael dissented. He agreed with the majority that a Privacy Act plaintiff "must prove he has suffered an adverse effect as a result of an agency's intentional or willful violation of the Act," that "emotional distress can qualify as an adverse effect and that Buck Doe's statements about his emotional distress are sufficient to allow a finding that he suffered an adverse effect as a result of the Department of Labor's wrongful disclosure of his social security number." App. 30a. Judge Michael would have held, however, that a Privacy Act plaintiff who proves an "adverse effect" caused by an agency's "willful or intentional" disclosure of private information can recover $1,000 statutory damages under

Section 552a(g)(4)(A) without further proving some measure of "actual damages." App. 25a.

Judge Michael noted that the Act expressly states, in language preceding Section 552a(g)(4)(A)'s "person entitled to recovery" clause, that the United States "shall be liable" to an individual who demonstrates an "adverse effect" caused by an "intentional or willful" violation of the Act. App. 31a-32a & n.4. Thus, "the phrase 'person entitled to recovery' is more naturally read to mean anyone to whom 'the United States shall be liable . . . .'" App. 30a. Moreover, "[a]s a matter of ordinary language usage, an entitlement to 'recovery' is surely broader than an entitlement to actual damages." App. 31a. This view finds support in the "text of the statute allow[ing] . . . a plaintiff who has proven an intentional or willful violation of the Privacy Act to recover costs and reasonable attorney fees even if the plaintiff has suffered no actual damages at all." App. 32a.

Judge Michael buttressed his interpretation with three additional arguments. *First*, "most circuit courts have read the Privacy Act to allow recovery of statutory damages without proof of actual damages." App. 33a. *Second*, the interpretation is "consistent with" the Privacy Act Guidelines, which are "due the deference accorded to the interpretation of an agency charged with oversight of implementation." App. 35a (internal quotation marks omitted). *Third*, the interpretation conforms with that given other statutory damages provisions similar in language, structure, and purpose to Section 552a(g)(4). App. 35a-39a (citing 26 U.S.C. § 7217(c) (Supp. 1981) and 18 U.S.C. § 2707).

Judge Michael criticized the majority's application of a sovereign immunity-based narrowing construction. He "doubt[ed]" that the canon applies when the question is "what a plaintiff must prove to obtain relief that has been unequivocally authorized" and not "whether a lawsuit may be brought at all or

about the availability of certain forms of relief." App. 46a & n.10. In any event, Judge Michael reasoned, the scales "decisively tip" in favor of his interpretation. App. 46a-47a. Congress clearly desired citizen enforcement of the Privacy Act, and damages arising from invasion of privacy wrongs "can be hard to quantify . . . because the typical injury caused . . . is mental distress." App. 50a. Without a statutory damages remedy available in the absence of "actual damages," few individuals would have incentive to sue, and the Act would lose its remedial and deterrent effects. App. 52a, 59a.

The Fourth Circuit denied Doe's petition for rehearing and suggestion of rehearing *en banc*. App. 1a-2a.

REASONS FOR GRANTING THE WRIT

The Fourth Circuit conceded that, in holding that the Privacy Act awards statutory damages for an agency's wrongful disclosure of personal data only if an individual proves some measure of actual damages, it deepened a substantial split of authority among the circuits. *See* App. 12a-13a & n.3. In doing so, the Fourth Circuit rejected the plain reading of Section 552a(g)(4) in favor of a cramped construction that ignores or renders superfluous other language in the Act, reaches a result directly contrary to the Privacy Act's purposes as expressed in the statute's text and legislative history, and conflicts with OMB's administrative interpretation — even as it acknowledged that nothing in the Act's text "compelled" the result reached. App. 12a. Moreover, the decision below erodes the civil enforcement scheme built into the Privacy Act, rendering it incapable of effectively remedying privacy invasions or deterring agency violations. For these reasons, the Court should grant certiorari and reverse the decision below.

I. THERE IS A SUBSTANTIAL CIRCUIT SPLIT ON THE QUESTION OF WHETHER A STATUTORY DAMAGES AWARD UNDER SECTION 552a(g)(4) OF THE PRIVACY ACT REQUIRES PROOF OF "ACTUAL DAMAGES"

As acknowledged in the decision below (App. 12a & n.3; App. 33a-34a (Michael, J., dissenting)), there is a multi-circuit split of authority on the question of whether a $1,000 statutory damages award under Section 552a(g)(4) of the Privacy Act requires proof of "actual damages." The Fourth Circuit's decision accords with a decision of the Sixth Circuit, but conflicts with decisions of the Fifth, Ninth, Tenth, Eleventh, and D.C. Circuits.

The Eleventh Circuit's decision in *Fitzpatrick v. IRS*, 665 F.2d 327 (11th Cir. 1982), concerned an award of "statutory minimum $1,000 damages" for the IRS's willful disclosure of a disability benefits application. *Id.* at 328. After analyzing the Privacy Act's text and legislative history, the Eleventh Circuit concluded that Section 552a(g)(4)(A) permits an award of $1,000 statutory damages without proof of any "actual damages." The court reasoned that "[t]o avoid a situation in which persons suffering injury had *no provable damages* and hence *no incentive to sue*, a $1,000 damage floor was added, and costs and attorneys' fees were included as additional elements of recovery." *Id.* at 330 (emphasis added). Thus, because the appellant's asserted mental injuries were not "actual damages" under the Privacy Act, and because the appellant had not proved any other "actual damages," "he could not recover beyond the statutory $1,000 minimum damages, costs, and attorneys fees." *Id.* at 331.

The Fifth, Ninth, Tenth, and D.C. Circuits all have likewise held that $1,000 statutory damages are recoverable under Section 552a(g)(4)(A) without proof of "actual damages." *See Johnson v. Dep't of Treasury*, 700 F.2d 971, 977 & n.12 (5th Cir. 1983) (the "statutory minimum of $1000, of course, is recoverable" even

when a Privacy Act plaintiff has not shown "actual damages"); *Wilborn v. Dep't of Health & Human Servs.*, 49 F.3d 597, 602 (9th Cir. 1995) (citing *Fitzpatrick*; "purpose of the minimum damage provision is to give those with 'no provable damages' the incentive to sue"); *Parks v. IRS*, 618 F.2d 677, 683 (10th Cir. 1980) (Privacy Act complaint is sufficient "even though the plaintiff suffered no pecuniary loss nor physical harm" where he alleges an "adverse effect" in the form of "psychological harm" and "intentional or willful misconduct"); *Waters v. Thornburgh*, 888 F.2d 870, 872 (D.C. Cir. 1989) (plaintiff who suffers an adverse effect as a result of an intentional or willful violation of the Privacy Act is "entitled to the greater of $1,000 or the actual damages sustained"); *Tomasello v. Rubin*, 167 F.3d 612, 614, 618 & n.6 (D.C. Cir. 1999) (upholding statutory damages award even though claimant had neither proven pecuniary losses nor argued that he was entitled to emotional distress damages).

The decision below accords with the Sixth Circuit's decision in *Hudson v. Reno*, 130 F.3d 1193 (6th Cir. 1997), *overruled in part on other grounds*, *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001). *Hudson* concerned a claim that the Department of Justice had collected information from third parties in violation of Section 552a(e)(2). *Id.* at 1204. The Sixth Circuit held that the district court had correctly rejected the claim on several grounds, among them "failure to show 'actual damages,' as required by the Act." *Id.* at 1207.

In sum, the courts of appeals are now divided five-to-two on the question of whether a $1,000 statutory damages award under Section 552a(g)(4) of the Privacy Act requires proof of "actual damages." This Court's review is necessary to resolve this substantial judicial conflict.

II. THE DECISION BELOW INVOLVES AN IMPORTANT AND RECURRING QUESTION OF FEDERAL LAW THAT MERITS THIS COURT'S IMMEDIATE REVIEW

It is crucial that the Privacy Act's civil enforcement provisions be interpreted uniformly. As the frequency and risks of personal data disclosures continue to increase, individuals and the federal government must know with certainty what obligations and potential liabilities the Act's civil enforcement provisions impose.

The very access to personal records through "computers and sophisticated information technology" that Congress anticipated in 1974, *see* Pub. L. 93-579 § 2(a)(2), accounts for the surge in personal data disclosures and their attendant risks. An example is "identity theft," which is the "the fastest-growing financial crime in America and perhaps the fastest growing crime of any kind in our society." S. Hoar, *Identity Theft: The Crime of the New Millennium*, 49(2) United States Attorneys' USA Bulletin (Mar. 2001), *available at* www.usdoj.gov/criminal/cybercrime/usamarch2001_3.htm. Federal database disclosures of social security numbers have been a specific cause of identity theft's rapid spread. D. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 Minn. L. Rev. 1137, 1138-39 (2002); *see* S. Rep. No. 93-1183, at 28, *reprinted in Source Book* at 181 (disclosure of social security numbers is "one of the most serious manifestations of privacy concerns in the Nation").

Furthermore, federal agencies are collecting and sharing ever-increasing amounts of personal data. The recently enacted Homeland Security Act of 2002 ("HSA"), Pub. L. 107-296, 116 Stat. 135, provides an example. As part of the effort to combat terrorism, the HSA confers tremendous power on the Department of Homeland Security ("DHS"), in concert with a number of other federal agencies, to collect, analyze, maintain, and disseminate

information about individuals. *Id.* tit. II & §§ 427, 429, 801, 891-99, 1001-06. Congress recognized that DHS's exercise of these powers would frequently implicate the Privacy Act, which it viewed as an important check on any possible misuse of information. *See* H.R. Rep. No. 107-609, at 90-91 (2002). Indeed, Congress created a DHS "Privacy Officer" responsible for "assuring that personal information contained in Privacy Act systems of records is handled in full compliance with fair information practices as set out in the Privacy Act of 1974," and "preparing a report to Congress on an annual basis of activities of the Department that affect privacy, including complaints of privacy violations, implementation of the Privacy Act of 1974, internal controls, and other matters." Pub. L. 107-296 §§ 222(2)-(5).[3]

From the perspective of individuals, resolution of Section 552a(g)(4)'s proper interpretation will largely determine whether the Act's civil enforcement provisions can effectively vindicate rights granted by the statute and deter agency disclosures of private information. As this Court has recognized, the type of injury most commonly associated with an invasion of privacy is inherently-difficult-to-prove and unquantifiable mental distress. *Time, Inc. v. Hill*, 385 U.S. 374, 384 n.9 (1967); *see generally* 2 D. Dobbs, *Law of Remedies* §§ 7.1, 7.3(4) (2d ed. 1993). Accordingly, the availability — or lack of availability — of $1,000

[3] Other examples of recent federal efforts to increase the collection and sharing of personal data abound. *See, e.g.*, Defense Advanced Research Projects Agency, *Strategic Plan* 9-10 (Feb. 2003) (discussing Total Information Awareness project to "correlate and share data from databases maintained by our intelligence, counterintelligence, and law enforcement agencies"); *The Intensifying Scrutiny at Airports*, BusinessWeek Online (June 5, 2002), *available at* http://www.businessweek.com/technology/content/jun2002/tc2002065_2255.htm (discussing CAPPS II system, which compares passenger manifests with data "pull[ed] in . . . from banks, credit-reporting agencies, and other companies that aggregate personal information").

statutory damages under Section 552a(g)(4) in the absence of provable "actual damages" will, in most instances, drive an individual's incentive to bring a civil enforcement action.

From the perspective of the federal government, the persistent split of authority makes it difficult to gauge potential liability with any degree of certainty. "[I]ssues of substantial importance concerning the liability of the United States" ordinarily counsel review by this Court. *United States v. Mitchell*, 463 U.S. 206, 211 (1983). Without a uniform interpretation of Section 552a(g)(4), the federal government will have difficulty assessing its potential Privacy Act liability, and thus will lack information crucial to informed decisions about implementing data collection, analysis, maintenance, and dissemination policies.

Finally, the split of authority over the meaning of Section 552a(g)(4) raises a substantial question about the meaning of nearly identical language in the Electronic Communications Privacy Act of 1984 ("ECPA"), Pub. L. 99-508, 100 Stat. 1848. The ECPA authorizes "any provider of electronic communication service, subscriber or other person aggrieved" to file a civil action against a person or entity that wrongfully discloses stored electronic communications. 18 U.S.C. § 2707(a). In language almost identical to Section 552a(g)(4)(A) of the Privacy Act, it further provides:

> The court may assess as damages in a civil action under this section the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation, but in no case shall a person entitled to recover receive less than the sum of $1,000.

Id. § 2707(c). Congress and some lower federal courts have stated that this provision establishes a minimum recovery of $1,000 for ECPA violations regardless of any proven actual damages or profits made by the violator. *See* S. Rep. No. 99-541, at 43

(1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3597; *United Labs., Inc. v. Rukin*, No. 98-C-602, 1999 WL 608712, at *5 (N.D. Ill. Aug. 4, 1999); *Dawson v. Leewood Nursing Home, Inc.*, 14 F. Supp. 2d 828, 832 (E.D. Va. 1998). But the ECPA and Privacy Act "share a common *raison d'etre*" and "the similarity of language . . . is, of course, a strong indication that the two statutes should be interpreted *pari passu*." *Northcross v. Bd. of Educ.*, 412 U.S. 427, 428 (1973). Thus, the conflicting interpretations of Section 552a(g)(4)(A) create uncertainty in the law that stretches beyond the Privacy Act.

III. THE DECISION BELOW MISCONSTRUES SECTION 552a(g)(4) OF THE PRIVACY ACT

In conditioning a statutory damages award under Section 552a(g)(4) upon proof of some "actual damages", the decision below rejects the plain reading of the Privacy Act's text, reaches a result directly contrary to the Privacy Act's purposes as expressed in the statute's text and legislative history, and ignores OMB's contrary administrative interpretation of Section 552a(g)(4).

In language preceding Section 552a(g)(4)(A), the Act states plainly that the "United States shall be liable" to a plaintiff who proves that he suffered an "adverse effect" caused by an agency's "intentional or willful" violation of the Act. 5 U.S.C. §§ 552a(g)(1)(D), (g)(4). As the dissent below properly recognized, App. 30a-32a, the phrase "person entitled to recovery" in Section 552a(g)(4)(A) simply encompasses all those to whom "the United States shall be liable." Sections 552a(g)(4)(A) and (B) provide the *measure* of that liability — at a minimum, the "sum of" $1,000 in statutory damages and attorneys' fees. They do not set forth additional elements required to establish liability *vel non*. Certainly, a plaintiff who establishes "actual damages" may recover them, but Section 552a(g)(4)(A) does not condition the United States' liability on such proof.

The majority below reached a contrary interpretation by ignoring the surrounding text of Section 552a(g)(4) as well as other relevant provisions of the Act and instead focusing entirely on subparagraph (A). App. 10a-12a. This acontextual construction violates the "central tenet" that "a statute is to be considered in all its parts when construing any one of them." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35-36 (1998); *accord, e.g., United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 217-18 (2001). The majority's failure to heed this fundamental rule of construction introduces a number of anomalies into the Act.

For one thing, it drains Section 552a(g)(1)(D)'s "adverse effect" requirement of all independent meaning. Courts have deemed this requirement to serve standing and causation functions. *See, e.g., Quinn v. Stone*, 978 F.2d 126, 135 (3d Cir. 1992). But if a "person entitled to recovery" can only be someone who has proven actual damages, then standing, causation, and an "adverse effect" have necessarily been shown. A "statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks omitted).

For another thing, the decision below suggests that a plaintiff who establishes the United States' liability under Section 552a(g)(1)(D) could obtain attorneys' fees even if he is entitled to no damages — actual *or* statutory. App. 32a & n.3. Such a result would be at odds with the usual rule that only a plaintiff who substantially prevails obtains attorneys' fees. The Act's structure confirms that it creates no such oddity. In actions for injunctive relief under Sections 552a(g)(1)(A) and (B), the Act conditions an award of attorneys' fees on a finding that "the complainant has substantially prevailed." 5 U.S.C. §§ 552a(g)(2)(B) & (3)(B). But Section 552a(g)(4)(B)'s attorneys' fees provision omits this

qualifier, and "it is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another. . . ." *Chicago v. Envtl. Defense Fund*, 511 U.S. 328, 338 (1994) (internal quotation marks omitted). The omission indicates that Congress deemed Section 552a(g)(1)(D) plaintiffs who demonstrate an adverse effect caused by an agency's intentional or willful action to have "substantially prevailed" because they become entitled to damages of at least $1,000. This damages recovery triggers a concomitant award of attorneys' fees.

The decision below's flawed construction cannot be salvaged by a sovereign immunity canon of construction. App. 13a-14a. *First*, as shown above, Section 552a(g)'s text plainly allows recovery of $1,000 statutory damages without proof of "actual damages." *See, e.g., United States v. Williams*, 514 U.S. 527, 540 (1995) (Scalia, J., concurring) ("The rule does not, however, require explicit waivers to be given a meaning that is implausible."). *Second*, none of the authority cited below supports application of the canon where Congress has expressly waived immunity to suit and to damages liability. *See Lane v. Pena*, 518 U.S. 187, 191 (1996) (determining whether administrative agencies are liable at all for money damages under the Rehabilitation Act); *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992) (determining whether monetary relief was available at all). To the contrary, this Court has held that where, as here, a statute explicitly waives sovereign immunity to money damages, courts should not "as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it." *Indian Towing Co. v. United States*, 350 U.S. 61, 68-69 (1955) (construing the Federal Tort Claims Act); *accord Smith v. United States*, 507 U.S. 197, 203 (1993).

The decision below also reaches a result at odds with the Act's purposes as stated in the legislative history and statutory text. The

legislative history confirms that Congress intended the Act to "encourage the widest possible citizen enforcement through the judicial process." S. Rep. No. 93-1183, at 83, *reprinted in Source Book* at 236; *see* H.R. Rep. No. 93-1416, at 15, *reprinted in Source Book* at 308 ("constant vigilance of individual citizens backed by legal redress" is the "best means" of enforcing the Act). But the decision below would force Privacy Act plaintiffs not only to overcome the challenges of showing an "adverse effect" and "intentional or willful" behavior, but also to prove "actual damages," which are seldom the injury resulting from a privacy invasion. *See supra* p. 14. Few individuals would have incentive to enforce the Privacy Act, and fewer still would have a significant chance of prevailing on their claims. The civil remedies provision would become incapable of ensuring that the Act fulfills its purposes to "permit an individual to determine what records pertaining to him are collected, maintained, used, or disseminated" and to "safeguard . . . against an invasion of privacy." Pub. L. 93-579 § 2(b)(1).[4]

Further reinforcing these statutory purposes, the legislative history characterizes Section 552a(g)(4)(A)'s $1,000 statutory damages remedy as "liquidated damages . . . [to be] assessed against the agency for a violation of the Act." *Source Book* at 768; *see also* H.R. Rep. No. 93-1416, at 38, *reprinted in Source Book* at 330 (discussing the need for a "liquidated damages" provision to "deter" agency violations of the Act). As a general matter, it is "not essential" to an award of "liquidated damages" that "the plaintiff sustained actual damages." C. McCormick, *Damages* 622 (1935); *accord* 3 D. Dobbs, *Law of*

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[4] The Privacy Act creates criminal penalties for certain improper disclosures of information. 5 U.S.C. § 552a(i). The criminal provisions are "rarely employed" and, therefore, "individuals bear the burden of enforcing the Privacy Act." 2 J. O'Reilly, *Federal Information Disclosure* § 22.1 (3d ed. 2000).

Remedies § 12.9(2) (2d ed. 1993); 25 C.J.S. *Damages* § 175 (2002). Thus, the Act allows plaintiffs to recover some liquidated damages for the dignitary harm of a privacy invasion, thereby providing incentive to sue and deterring agency violations. 2 D. Dobbs, *supra*, § 7.3(4). The $1,000 cap on those damages, however, avoids risks of excessive liability. *Id.*; *see* App. 52a n.14.

The decision below also conflicts with — and, in fact, ignores — the longstanding contemporaneous construction of Section 552a(g)(4)(A) by OMB, the agency specifically charged with administering the Act. *See* Pub. L. 93-579 § 6; *see supra* pp. 4-5. In pertinent part, the Privacy Act Guidelines provide that "actual damages or $1,000, whichever is greater," are awarded to an individual who suffers an adverse effect as a result of an intentional or willful violation of the Act. 40 Fed. Reg. at 28,970; *see supra* pp. 4-5. The Guidelines are thus "consistent" with an interpretation of the Privacy Act allowing an award of $1,000 statutory damages absent proof of actual damages. App. 35a (Michael, J., dissenting). Certainly, "the well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Olmstead v. Zimring*, 527 U.S. 581, 598 (1999) (internal quotation marks omitted). This is especially so where, as here, OMB's interpretation is longstanding and unchanged by numerous additions to and amendments of the

Guidelines. *See NLRB. v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974).[5]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 14, 2003

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[5] Other courts of appeals have afforded the Guidelines "the deference accorded to the interpretation of an agency charged with 'oversight' of implementation." *Quinn*, 978 F.2d at 133; *accord, e.g., Bechhoefer v. U.S. Dep't of Justice Drug Enforcement Admin.*, 209 F.3d 57, 61-62 (2d Cir. 2000); *Baker v. Dep't of Navy*, 814 F.2d 1381, 1383 (9th Cir. 1987); *Perry v. FBI*, 759 F.2d 1271, 1275-76 & n.7 (7th Cir. 1985); *Clarkson v. IRS*, 678 F.2d 1368, 1374 (11th Cir. 1982); *Albright v. United States*, 631 F.2d 915, 919 n.5 (D.C. Cir. 1980).

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 00-2247
CA-97-43-2

ROBERT DOE, a/k/a Virginia Privacy Litigation; TAYS DOE, a/k/a Virginia Privacy Litigation; BUCK DOE, a/k/a Virginia Privacy Litigation; OTIS DOE, a/k/a Virginia Privacy Litigation; THOMAS DOE, a/k/a Virginia Privacy Litigation; JOE DOE, a/k/a Virginia Privacy Litigation; CHARLES DOE, a/k/a Virginia Privacy Litigation; DICK DOE, a/k/a Virginia Privacy Litigation

Plaintiffs - Appellants

v.

ELAINE I. CHAO, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

Defendant – Appellee.

No. 00-2292
CA-97-0043-2

ROBERT DOE, a/k/a Virginia Privacy Litigation; TAYS DOE, a/k/a Virginia Privacy Litigation; BUCK DOE, a/k/a Virginia Privacy Litigation; OTIS DOE, a/k/a Virginia Privacy Litigation; THOMAS DOE, a/k/a Virginia Privacy Litigation; JOE DOE, a/k/a Virginia Privacy Litigation; CHARLES DOE, a/k/a Virginia Privacy Litigation; DICK DOE, a/k/a Virginia Privacy Litigation

Plaintiffs - Appellees

v.

ELAINE I. CHAO, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

Defendant – Appellant.

On Petition and Rehearing and Rehearing En Banc

The appellants' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
CLERK

November 15, 2002

UNITED STATES COURT OF APPEALS, FOR THE FOURTH CIRCUIT.

Robert DOE, a/k/a Virginia Privacy Litigation; Tays Doe, a/k/a Virginia Privacy Litigation; Buck Doe, a/k/a Virginia Privacy Litigation; Otis Doe, Virginia Privacy Litigation; Thomas Doe, Virginia Privacy Litigation; Joe Doe, Virginia Privacy Litigation; Charles Doe, a/k/a Virginia Privacy Litigation; Dick Doe, a/k/a Virginia Privacy Litigation,

Plaintiffs-Appellants,

v.

Elaine L. CHAO, Secretary of Labor, United States Department of Labor,

Defendant-Appellee.

Robert Doe, a/k/a Virginia Privacy Litigation; Tays Doe, a/k/a Virginia Privacy Litigation; Buck Doe, a/k/a Virginia Privacy Litigation; Otis Doe, Virginia Privacy Litigation; Thomas Doe, Virginia Privacy Litigation; Joe Doe, Virginia Privacy Litigation; Charles Doe, a/k/a Virginia Privacy Litigation,

Plaintiffs-Appellees,

v.

Elaine L. Chao, Secretary of Labor, United States Department of Labor,

Defendant-Appellant.

Nos. 00-2247, 00-2292.
Argued Sept. 26, 2001.
Decided Sept. 20, 2002.

Before LUTTIG, WILLIAMS, and MICHAEL, Circuit Judges.

Affirmed in part, reversed in part, and remanded by published opinion. Judge WILLIAMS wrote the opinion, in which Judge LUTTIG joined. Judge MICHAEL wrote an opinion concurring in part and dissenting in part.

OPINION

WILLIAMS, Circuit Judge.

In this case, several individuals[1] (collectively Appellants) seek recovery against the Secretary of Labor (the Government) under the Privacy Act, 5 U.S.C.A. § 552 *et seq.* (West 1996 & Supp. 2000), and the United States Constitution for the disclosure of their Social Security numbers (SSNs) incident to the adjudication of their black lung compensation claims. They also seek certification of a class of persons whose SSNs were so disclosed. Because we hold that a Privacy Act plaintiff only may recover money damages upon a showing of actual damages, and because Appellant Buck Doe has not made such a showing, we reverse the district court's grant of summary judgment in favor of Buck Doe and hold that the Government was entitled to summary judgment in its favor as to Buck Doe's claim. We affirm the district court's grant of summary judgment in the Government's favor with regard to each of the other Appellants, because no Appellant other than Buck Doe could show any adverse effect stemming from a violation of the Act. We further affirm the district court's denial of leave for Appellants to amend their complaints and submit additional damages evidence. Additionally, because

[1] The Appellants are Tays Doe, Robert Doe, Buck Doe, Charles Doe, Joe Doe, Otis Doe, and Thomas Doe.

it is clear that Appellants' claims are not typical of the claims of the putative class, we affirm the district court's denial of class certification.

I.

The Department of Labor's Office of Workers' Compensation Programs (OWCP) and its Division of Coal Mine Workers' Compensation are charged by Congress with the task of adjudicating black lung compensation claims. These offices retain the files of over one million coal miners who have filed for black lung benefits. To facilitate the processing of claims, OWCP assigned to each black lung claim a unique identifier called an "OWCP number" and used this number to identify the claim throughout the benefits adjudication process. (J.A. at 107, 109-10.) When a coal miner applied for benefits, he was asked to provide his SSN voluntarily and was informed that the number may be used to facilitate determination of benefits eligibility. Prior to the entry of a consent agreement in this case, if a black lung benefits applicant provided his SSN, OWCP used the SSN as the "OWCP number" for identification of the miner's claim. Further, certain administrative law judges (ALJs) sent out a form of "multi-captioned" hearing notice, listing in a single document the hearing dates for a number of different miners' claims. (J.A. at 131.) In this way, the SSNs of numerous benefits applicants were (1) disclosed to other applicants, their employers, and counsel, and (2) frequently included in publicly released ALJ and Benefits Review Board decisions that, in turn, were published in benefits decision reporters and made available in computerized legal research databases. Appellants are black lung benefits claimants whose SSNs were disclosed in this manner, and they allege in their complaints that the disclosure of their SSNs caused them emotional distress. Buck Doe and five

other Appellants, all suing under pseudonyms, brought this Privacy Act case by filing separate complaints in the district court. Although several additional persons moved to intervene as plaintiffs in this case, the docket sheet indicates that the district court granted leave to intervene only to one of these persons, Tays Doe. (J.A. at 5.) On February 20, 1997, Appellants and the Government consented to the district court's entry of a stipulated order prohibiting the Government from disclosing the SSN of any black lung claimant by including his SSN on multi-captioned hearing notices disseminated to persons not associated with the claimant's claim. Appellants then filed a motion seeking certification of a class comprising "all claimants for Black Lung Benefits since the passage of the Privacy Act." (J.A. at 81.) Both the Government and Appellants moved for summary judgment.

The district court consolidated the seven individual actions and appointed a magistrate judge, pursuant to 28 U.S.C.A. § 636(b)(1)(b), to prepare a Report and Recommendation regarding the summary judgment motions and the motion for class certification. After holding several hearings, the magistrate judge recommended denying summary judgment for Appellants and granting summary judgment for the Government on all claims other than Buck Doe's. Appellants, viewing the basis for the magistrate judge's recommendation as a defect in their pleadings, then moved to file amended complaints alleging emotional distress with greater particularity than was the case in their original complaints, and to file affidavits substantiating their emotional distress claims. The magistrate judge recommended denial of the motion, finding it to be out of time and further concluding that the damages deficiencies in Appellants' cases were failures of proof, not pleading. Subsequently, the district court adopted the magistrate

judge's recommendations that the motion to file amended complaints and supplemental affidavits be denied, that class certification be denied, and that the Government be granted summary judgment on the claims of all Appellants except for Buck Doe. The district court rejected the magistrate judge's recommendation to deny Buck Doe's motion for summary judgment, however, and entered summary judgment awarding Buck Doe $1,000 in statutory damages. The district court held that "actual damages" must be proven to obtain the Privacy Act's $1,000 in statutory damages. Because the district court found that the primary element of damage in privacy cases is ordinarily emotional distress, however, the district court held that proven emotional distress constitutes "actual damages" sufficient to permit recovery of the $1,000 statutory minimum damages amount. The district court held that Buck Doe produced sufficient evidence of emotional distress to justify summary judgment in his favor in the amount of the $1,000 statutory damages award. The district court also found that Appellants had substantially prevailed and were entitled to attorney's fees but did not award a specific amount of attorney's fees, reserving judgment on this issue pending the presentation of a petition for attorney's fees.

Both Appellants and the Government timely appealed, raising a number of challenges to the district court's decision. On appeal, Appellants argue that "actual damages" are not required for recovery of the $1,000 statutory damage amount and that in the alternative, the district court correctly held that emotional distress counts as "actual damages." The Government argues, on the other hand, that "actual damages" are required, that such damages encompass only out-of-pocket or pecuniary harm, rather than non-pecuniary emotional distress, and that even if non-pecuniary emotional distress constitutes compensable

"actual damages," no Appellant produced adequate evidence of such emotional distress to survive summary judgment.

The district court's grant of summary judgment is reviewed de novo. *Providence Square Assoc. v. G.D.F., Inc.*, 211 F.3d 846, 850 (4th Cir. 2000) (stating that a district court's grant of summary judgment is reviewed de novo). After examining the text of the Privacy Act, we will first address the question of whether "actual damages" are a precondition to recovery of statutory minimum damages under the Act. We will then turn to the issues of whether sufficient evidence of "actual damages" to survive summary judgment was presented, the propriety of the district court's denial of Appellants' motion to amend the pleadings and offer supplemental evidence, the district court's denial of class certification, and the district court's rejection of Appellants' claims under the United States Constitution.

II.

The relevant provision of the Privacy Act provides that:

> (4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of–
>
> (A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and
>
> (B) the costs of the action together with reasonable attorney fees as determined by the court.

5 U.S.C. § 552a(g)(4).

The question we must decide is whether a person must suffer "actual damages" in order to be considered "a person entitled to recovery" within the meaning of section 552a(g)(4)(A), and therefore entitled to the statutory minimum of $1,000 under that section. We hold that a person must sustain actual damages to be entitled to the statutory minimum damages award. We find this interpretation ultimately persuasive for several reasons, perhaps no one of which alone would be dispositive, but the aggregate of which are convincing.

First, and most importantly, the operative phrase "a person entitled to recovery" appears in subparagraph (A), the sole and entire purpose of which is to limit the liability of the United States to actual damages sustained. The legislative placement of the phrase in this subparagraph—indeed, within the very same sentence as that limiting Governmental liability to actual damages—almost itself confirms, *as a matter of statutory interpretation,* that the referenced "person entitled to recovery" is one who has suffered actual damages. In effect, through this placement, Congress has defined "recovery" (albeit indirectly) by its express limitation of the Government's liability to actual damages sustained: The authorized "recovery" (apart from costs and attorney fees, which are separately provided for) can only exceed the amount of actual damages where actual damages are greater than $0 but less than $1,000. Thus the provision does not create "statutory damages," but only provides for a "statutory minimum" to actual damages.

It would be odd, to say the least, for Congress to have limited the liability of the United States to actual damages and, in the very same sentence, to have authorized, for a plaintiff to whom the United States is found liable, recovery not merely beyond actual damages, but in the complete absence of such damages. That Congress would have done

so in as circuitous and oblique a fashion as the dissent suggests borders on the inconceivable. By contrast, reading the section to require actual damages gives effect to the eminently reasonable (and generally to be expected) presumption that the legislature correlated the plaintiff's recovery entitlement with the defendant's liability by limiting the plaintiff's recovery to actual damages and by providing, by way of incentive to suit, for at least a minimum recovery even where actual damages are minimal.

Second, and relatedly, we believe that the location of the phrase "a person entitled to recovery" within the very same subparagraph and sentence as the limitation of the Government's liability to actual damages sustained, without any other explicit reference, establishes *as a grammatical matter,* as well, that the reference of this phrase is to one who is able to show actual damages. That is, having just defined the recovery that will be permitted against the United States as that of actual damages, it would torture all grammar to conclude that the phrase "a person entitled to recovery" references anyone other than one who has sustained actual damages.

Third, that the two clauses of (g)(4)(A) are separated by the conjunction "but," serves to reinforce the conclusion that the second clause ("in no case shall a person entitled to recovery receive less than the sum of $1,000") adds a qualification with respect to the class of plaintiffs defined by the first (those who have suffered actual damages)—namely, that in no event shall such person recover less than $1,000.

And, though not necessary to our conclusion, the absence of clear language authorizing an award without a showing of actual damages, where such language is readily available and to be expected, only further underscores the correctness

of a construction that proof of actual damages is required for recovery of the statutory $1,000 minimum. As the dissent acknowledges, Congress, with ease, could have phrased the liability provision to provide unequivocally for a statutory minimum recovery, even for those who are unable to prove actual damages.[2] For instance, section 4 and subsection (A) could have been phrased in the following, or similar, terms: "the United States shall be liable to the individual in an

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[2] We do not believe that the interpretation of § 552a(g)(4)(A) that we adopt undermines the purposes of the Privacy Act's damages provision, as the dissent asserts. *Post,* at 197. The text of § 552a(g)(4) demonstrates that Congress rationally chose to *augment* damages awards for persons able to demonstrate some "actual damages" in order to encourage citizen enforcement of the Act while denying statutory damages to persons who cannot meet the "actual damages" standard, in order to serve a competing objective: preventing the imposition of potentially substantial liability for violations of the Act which cause no "actual damages" to anyone. The dissent's general observation that "Congress creates statutory damages remedies because it wants to encourage civil enforcement suits," *Post,* at 198, does not establish that Congress meant, in light of competing considerations, to encourage such suits to the degree suggested by the dissent's approach. Furthermore, even assuming that recourse to legislative history is permissible here, the dissent can point to no legislative history addressing how Congress meant to balance these competing considerations in the context of the Act's actual damages provision. *Post,* at 198 n.12 (noting the paucity of legislative history surrounding § 552a(g)(4)(A)'s minimum damages remedy). Instead, the dissent relies on the legislative history of other, *later-enacted* statutes. It is counterintuitive, however, to believe that the purpose of a later Congress comprised of different members and addressing different problems can be imputed back in time to the Congress that enacted the Privacy Act. *See Sigmon Coal Co. v. Apfel,* 226 F.3d 291, 308 n.7 (4th Cir. 2001) (labeling as "dubious" any "attempt at determining whether the apparent intent of one Congress in enacting a statute is at all useful for discovering the intent of another Congress in enacting a separate, unrelated statute"), *aff'd, Barnhart v. Sigmon Coal Co., Inc.,* 534 U.S. 438 (2002).

amount equal to the sum of (A) which-ever is greater: actual damages sustained by the individual as a result of the refusal or failure, or $1,000." That instead of such an unambiguous directive, Congress, in this simple, straightforward statute expressly providing for the recovery of actual damages against the United States, provided *sub silentio* for an award to one who has not even suffered actual damages at all, strains the powers of reasonable inference.

The dissent's primary point is, as it frankly acknowledges, an implicit one. *Post,* at 188-89. And as such, we would be constrained to reject it in favor of the textual analysis that we undertake above.[3] We reject the dissent's textual assertion that "recovery," as used in § 552a(g)(4)(A), should be read to reference § 552a(g)(4)(A)'s provision for an award of costs and attorney's fees, not only for the textual reasons recited, but also because the key phrase, "a person entitled to recovery," appears in the statute prior to the provision for costs and attorney's fees. We do not believe that Congress would have invoked a term whose definition is dependent upon a subsequent statutory provision. Furthermore, in the context of § 552a(g)(4)(A), which concerns itself with damages stemming from a violation of the Act rather than costs incurred in litigation, "recovery" is not plausibly read to reference litigation costs in the absence of any underlying compensable injury. We acknowledge that our

[3] Nor has any court examined closely the question we consider today, and none has analyzed the text of the statute at all. Those courts that have come to the same conclusion as the dissent rely exclusively on *ipse dixit, see Wilborn v. HHS,* 49 F.3d 597, 603 (9th Cir. 1995); *Parks v. IRS,* 618 F.2d 677, 682-83 (10th Cir. 1980); *Fitzpatrick v. IRS,* 665 F.2d 327, 331 (11th Cir. 1982); *Waters v. Thornburgh,* 888 F.2d 870, 872 (D.C.Cir. 1989), entitling them to no persuasive force whatsoever.

interpretation of section 552a(g)(4)(A) to require proof of actual damages as a condition for receipt of the statutory minimum award is not strictly compelled by the statute's language. We are convinced, however, that, for the aforesaid reasons, this construction is the most persuasive reading of the section. But even were the interpretive issue closer, the ambiguity would, in accordance with established principles of sovereign immunity, have to be resolved in favor of the interpretation we adopt today, because section 552a's damages provision represents a limited waiver of sovereign immunity. As the dissent itself concedes, "[i]t is, of course, clear that [if the sovereign immunity canon applies,] we must accept the narrower of two equally convincing interpretations." *Post,* at 195.[4]

It is axiomatic that limited waivers of the federal Government's sovereign immunity must be "strictly construed . . . in favor of the sovereign." *Lane v. Pena,* 518 U.S. 187, 192 (1996). A limited waiver of sovereign immunity must not be "enlarged beyond what the language

[4] The decisions from our sister circuits likewise support the conclusion that the scope of the Privacy Act's damages provision is to be interpreted in accordance with this principle of strict construction. *See Hudson v. Reno,* 130 F.3d 1193, 1207 n.11 (6th Cir. 1997) (holding that the doctrine that "courts must strictly construe waivers of immunity" requires that the Privacy Act damages provision, "when it is being applied against the Government ... must be narrowly interpreted" on the question of whether § 552a(g)(4)(A)'s "actual damages" include damages for emotional distress, loss of reputation, embarrassment, or other non-quantifiable injuries), *overruled in part on other grounds by Pollard v. E.I. du Pont de Nemours & Co.,* 532 U.S. 843 (2001); *Tomasello v. Rubin,* 167 F.3d 612, 618 (D.C.Cir. 1999) (finding that § 552a(g)(4) is governed by the strict construction mandated by *Nordic Village* on the question of whether related, contemporaneous disclosures must be treated as a single disclosure for purposes of the Act's $1,000 statutory damages amount).

requires." *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992) (internal citation omitted); *see also Lane*, 518 U.S. at 192. This principle of "strict construction" extends beyond the mere fact of waiver, to the "scope" of a waiver, which also must "be strictly construed . . . in favor of the sovereign." *Lane*, 518 U.S. at 192.

Needless to say, determining whether or not subparagraph (A) allows plaintiffs to receive statutory damages without first proving actual damages is a question of the scope of damages available under the subparagraph. The narrower reading of the statute that we adopt herein, therefore, would have to prevail over the dissent's by virtue of this stricter construction "in favor of the sovereign," *id.*, even were there more ambiguity in the statutory text.

III.

Having determined that the district court correctly ruled that proven "actual damages" are a precondition to recovery of § 552a(g)(4)(A)'s statutory minimum damages award, we now turn to the merits of the district court's ruling that Buck Doe succeeded in proving "actual damages" and was entitled to summary judgment in the amount of the Act's $1,000 statutory damages award. The district court held that proven emotional distress constitutes "actual damages" under § 552a(g)(4)(A) and that Buck Doe introduced uncontroverted evidence of such damages, sufficient to entitle him to summary judgment. On appeal, Appellants defend this ruling, while the Government argues that Buck Doe failed to introduce sufficient evidence of compensable emotional distress and that, in the alternative, the term "actual damages" as used in the Act does not include damages for emotional distress.

An award of compensatory emotional distress damages requires evidence "establish[ing] that the plaintiff suffered

demonstrable emotional distress, which must be sufficiently articulated; neither conclusory statements that the plaintiff suffered emotional distress nor the mere fact that a . . . violation occurred supports an award of compensatory damages."[5] *Price v. City of Charlotte*, 93 F.3d 1241, 1254 (4th Cir. 1996). A plaintiff's own conclusory allegations that he felt "embarrassed," "degraded," or "devastated," and suffered a loss of self-esteem, will not suffice to create a disputed issue of material fact for the jury regarding the presence of compensable emotional distress. *Id.* at 1255; *see also Brady v. Fort Bend County*, 145 F.3d 691, 718-19 (5th Cir. 1998) (in a § 1983 action, "vague and conclusory" testimony that a claimant was "highly upset," could not "accept it mentally," "didn't feel like the same person," or "spent more time on the couch" does not satisfy the specificity standard for compensable emotional distress). Where, on the other hand, a plaintiff can produce evidence that emotional distress caused chest pains and heart palpitations, leading to medical and psychological treatment which included a formal diagnosis of "major depressive disorder," as well as necessitated prescription medication, it is clear that some amount of compensatory damages for emotional distress is warranted. *Knussman v. Maryland*, 272 F.3d 625, 640 (4th Cir. 2001).

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[5] *Price* was decided in the context of claims arising under 42 U.S.C.A. § 1983, but we see no reason why the Privacy Act does not require at least the same particularized showing of emotional distress which is a prerequisite to recovery of emotional distress damages for the violation of the most precious of rights, those secured by the United States Constitution. *See, e.g., Southern Express Co. v. Byers*, 240 U.S. 612, 615 (1916) (noting, in the context of a common-law cause of action, "the elementary principle that mere pain and anxiety are too vague for legal redress") (internal quotation marks omitted).

In determining whether sufficient evidence exists to support an award of more than nominal damages for emotional distress, we examine factors such as the need for medical, psychological, or psychiatric treatment, the presence of physical symptoms, loss of income, and impact on the plaintiff's conduct and lifestyle. *Price,* 93 F.3d at 1255. In *Price,* we held that failure to establish emotional distress with sufficient evidence will result in the award of only nominal damages.[6] *Id.* Nominal damages, when available, are designed to vindicate legal rights "without proof of actual injury." *Carey v. Piphus,* 435 U.S. 247, 266

[6] It bears note that in *Price,* we addressed the showing necessary to justify an award of more than nominal damages for emotional distress, not the showing necessary to justify an award that is above some relatively high threshold of "substantiality," as the dissent appears to suggest. *Post,* at 200 n.15; *Price,* 93 F.3d at 1256 (awarding nominal damages to plaintiffs because they could not "prove emotional distress warranting compensatory damages"). *Price* is thus concerned with the level of evidence needed to support a conclusion that a plaintiff's emotional injuries were more than *de minimis* or ephemeral, in other words, adequate to warrant more than a nominal damage award for the technical invasion of a plaintiff's rights. *Id.* at 1256. Thus, the *Price* framework is not inappropriately rigorous in the context of the Privacy Act's "actual damages" requirement. To the contrary, as the dissent notes, the Act's "actual damages" requirement is distinct from and more rigorous than the requirement of an "adverse effect." *Post,* at 186 n.2, 188. Thus, claims of emotional injury, to satisfy the "actual damages" requirement, must meet a threshold *higher* than the "injury in fact" threshold applicable to the "adverse effect" inquiry. It follows that a showing of "very minor emotional distress," *Post* at 199, which, one supposes, would have to include *any* amount of momentary annoyance, angst, or irritation that might support a nominal damages award, cannot possibly suffice to establish "actual damages" under the Act. The consequent possibility that some "plaintiffs who suffer very minor harms will go uncompensated," *Post,* at 203, is the price of the "actual damages" provision's gatekeeping function of avoiding tremendous overcompensation of plaintiffs whose damages evidence fails to establish any meaningful injury at all.

(1978). An award of merely nominal damages means that a plaintiff has *not* shown "actual injury." Thus, if Buck Doe's emotional distress evidence would entitle him only to nominal damages under the *Price* framework, he has shown no "actual injury," in other words, no "actual damages sustained."

Buck Doe's evidence of emotional distress in this case falls far below the level which our precedent demands before the issue of compensatory damages for emotional distress may be submitted to the finder of fact. He testified that he was "greatly concerned and worried" about the disclosure of his SSN; that he felt his privacy had been violated in "words he cannot describe"; that he felt the consequences of the disclosure of his SSN could be "devastating" for himself and his wife, and that the disclosure of his SSN had "torn [him] all to pieces," in a manner that "no amount of money" could ever compensate. (J.A. at 55-56.) Compare *Price,* 93 F.3d at 1254-56 (holding that statements that one felt "embarrassed," "degraded," "devastated," etc., do not create a disputed issue of fact as to entitlement to compensatory damages for emotional distress); *Brady,* 145 F.3d at 718-20 (holding that there was no issue of fact as to entitlement to more than nominal damages for emotional distress based upon testimony that claimant was "highly upset," "spent more time on the couch," etc.). Buck Doe did not produce any evidence of tangible consequences stemming from his alleged angst over the disclosure of his SSN. He claimed no medical or psychological treatment, no purchase of medications (prescription or over-the-counter), no impact on his behavior, and no physical consequences. Further, no evidence of any kind corroborates the conclusory allegations in Buck Doe's affidavit. Under these circumstances, we need not reach the issue of whether the

term "actual damages" as used in the Act encompasses damages for non-pecuniary emotional distress because, regardless of the disposition of that issue, Buck Doe's claims fail for lack of evidentiary support.[7] In turn, because we have concluded that "actual damages" are a prerequisite to the recovery of statutory minimum damages, and because Buck Doe utterly failed to produce evidence sufficient to permit a rational trier of fact to conclude that he suffered any "actual damages," the district court's entry of summary judgment in Buck Doe's favor as to his entitlement to a statutory "actual damages" award must be reversed, and we must remand with instructions to enter summary judgment in favor of the Government on his claim.

IV.

We next address Appellants' challenge to the district court's refusal to allow them to amend their complaints or to proffer supplemental evidence supporting their emotional distress claims. After the magistrate judge recommended granting summary judgment for the Government, Appellants moved to amend their complaints and to file additional affidavits in support of their damages case. The magistrate judge recommended denying Appellants leave to amend

[7] The emotional distress allegations of the other Appellants are even less well-supported than Buck Doe's allegations and likewise fail. For example, Robert Doe testified that "nothing bad happened to [him] but [he] guess[ed] it could." (J.A. at 151.) The claims of plaintiffs other than Buck Doe are so totally lacking in any evidence of injury of any kind that, as the dissent concedes, they fail the Act's threshold "adverse effect" requirement, which is a threshold statutory standing principle, distinct from and less demanding than the "actual damages" requirement, that requires some negative consequence sufficient to constitute "injury in fact," separate from and caused by a violation of the Act. *See Quinn v. Stone*, 978 F.2d 126, 135 n.15 (3d Cir. 1992) (noting the distinction between "actual damages" and "adverse effect").

their complaints and to submit additional damages evidence. The magistrate judge reasoned that the proffered amendments to the complaints were belated and that, without making a showing of cause for the failure to submit the evidence earlier, a party is not entitled to submit additional evidence to resist summary judgment after a motion has been decided. The magistrate judge further reasoned that Appellants were on notice of the possible need to prove actual damages prior to the issuance of the recommendation to grant summary judgment. The district court, after a de novo review, adopted the magistrate judge's recommendation and denied Appellants' motion.

Appellants argue that the district court abused its discretion in denying them leave to amend their pleadings to include more specific allegations of emotional damages because leave to amend pleadings should be granted liberally.[8] *Island Creek Coal Co. v. Lake Shore, Inc.*, 832 F.2d 274, 279 (4th Cir. 1987) (noting that the policy favoring the adjudication of cases on the merits requires that

[8] Appellants also argue that the magistrate judge behaved improperly when, after the Government by letter stated that it did not intend to object to the amended pleadings and new material, the magistrate judge allegedly, in a telephone conference with counsel, urged the Government to change its position. The Government denies that the substance of this telephone conference was as Appellants allege. The Government clarifies that it did not actually consent to the amendment, which under Federal Rule of Civil Procedure 15(a), would have required the court to grant the amendment, but simply stated that it did not intend to object to the amendment. We hold that the district court did not abuse its discretion in recognizing the Government's decision, prior to the disposition of the motion to amend, to withdraw whatever consent had been conveyed by its earlier letter. Further, assuming that the magistrate judge stated to the Government that the pending motion to amend could, if granted, lead to a finding of liability, nothing suggests that the magistrate judge coerced the Government into changing its position.

leave to amend be given liberally when "justice so requires"). We conclude that the denial of Appellants' motion for leave to amend their complaints has no bearing on the outcome in this case because allegations in the pleadings would not suffice to survive summary judgment in any event. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986) (noting that a party resisting summary judgment "may not rest upon mere allegations or denials of [the] pleading, but must set forth specific facts showing that there is a genuine issue for trial"). Instead, the relevant issue is the refusal to accept new affidavits to buttress Appellants' damages evidence.

We review the district court's refusal to accept Appellants' supplemental affidavits on the issue of damages for abuse of discretion. *See United States v. Howell*, 231 F.3d 615, 622-23 (9th Cir. 2000) (reviewing for abuse of discretion a district court's refusal to permit the production of new evidence following a magistrate judge's recommendation regarding a dispositive motion).[9]

[9] Without adequate justification for the failure to present the evidence in question earlier, a district court may ignore belatedly tendered evidence offered in opposition to summary judgment after the court has ruled on a summary judgment motion. *Cray Communications, Inc. v. Novatel Computer Sys., Inc.*, 33 F.3d 390, 395 (4th Cir. 1994); *cf. Nguyen v. CNA Corp.*, 44 F.3d 234, 242 (4th Cir. 1995) (noting that a party seeking an extension of time to respond to a summary judgment motion must timely file affidavits specifying which aspects of discovery require more time to complete). While the new evidence was proffered between the magistrate judge's recommendation and the district court's adoption of the recommendation, Appellants do not argue that this fact is of any significance. The relevant statute states that a district court reviewing a magistrate judge's recommendation *must* review de novo disputed portions of a magistrate's report and "*may* also receive further evidence." 28 U.S.C.A. § 636(b)(1) (West 1993) (emphasis added). Because Congress used the permissive term "may" in connection with the receipt of additional evidence, the question of whether to consider such evidence rests within the sound discretion of the district court.

Appellants claim that they were not on notice regarding the need to produce evidence of actual damages to resist summary judgment and that this alleged lack of notice supports a finding that the district court abused its discretion in refusing to allow the filing of supplemental damages evidence. This contention is not well-founded because the Government, in a memorandum in support of its motion for summary judgment filed over a year prior to the magistrate judge's recommendation, argued that the Sixth Circuit's "actual damages" standard, as articulated in *Hudson v. Reno*, 130 F.3d 1193, 1207 (6th Cir. 1997), should govern and pointed to the absence of evidence sufficient to create a factual dispute as to actual damages under the *Hudson* standard. (Mem. in Support of Defendant's Supplemental Motion for Summary Judgment, at 21-24.) Having chosen not to present evidence of "actual damages" prior to the magistrate judge's recommendation, after the Government specifically argued that the governing law required such evidence, Appellants took a calculated risk that they would face an evidentiary insufficiency if they lost their legal argument regarding the need to prove "actual damages." We thus conclude that the district court did not abuse its discretion in declining to permit the presentation of new evidence on the ground that Appellants did not show cause for their failure to present it earlier.

V.

Appellants next challenge the district court's denial of their motion for class certification. A decision of a district court granting or denying a motion for class certification is reviewed on appeal for abuse of discretion, but the district court must exercise its discretion within the confines of

Federal Rule of Civil Procedure 23. *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 146 (4th Cir. 2001). The district court denied Appellants' motion for class certification on the ground that emotional damages require too much individualized proof to render the named representatives' claims typical of those of the class. The magistrate judge, in recommending denial of class certification, reasoned that emotional damages are likely to be so variable and fact-specific that damages issues overwhelm liability, precluding class certification. *See, e.g., Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 342-44 (4th Cir. 1998) (holding that the individualized nature of damages can, under some circumstances, destroy typicality).

Appellants argue that the district court's denial of class certification was erroneous because, in their belated amendments to their complaints, they decided to pursue only the $1,000 minimum statutory damages, so that damages are in fact identical for all class members. If their amendments had been accepted, however, Appellants still would have faced grave typicality problems for two reasons. First, an adverse effect is a core liability requirement for a Privacy Act suit. The Act allows a private suit against an agency when the agency "fails to comply with any . . . provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual . . . ." § 552a(g)(1)(D) (West 1996 & Supp. 2001). And second, as we have demonstrated in Part II *supra,* the Act requires proof of actual damages to obtain a damage award. No Appellant in this case, other than Buck Doe, could even show an adverse effect, and Buck Doe was unable to demonstrate actual damages. Assuming that the claims of unnamed class members include a number of claims for which there is some evidence of adverse effect and actual damages, the putative class representatives have

not suffered "injur[ies] similar to the injuries suffered by the other class members." *McClain v. South Carolina Nat'l Bank,* 105 F.3d 898, 903 (4th Cir. 1997). Additionally, the Government correctly notes that the proposed class was drafted without regard to the two- year statute of limitations for Privacy Act claims, *see* 5 U.S.C.A. § 552a(g)(5), so that the overwhelming majority of claims included in the proposed class may be time-barred. Brief of Appellee at 41. This, too, undermines typicality because the claims of the named representatives would differ from those of unnamed class members with potentially time-barred claims. Accordingly, the district court did not abuse its discretion in declining to certify the proposed class.

VI.

Finally, Appellants challenge the district court's rejection of their claim that the disclosure of their SSNs violated their right to privacy under the United States Constitution. The district court's grant of summary judgment for the Government is reviewed de novo. *Providence Square Assoc., L.L.C. v. G.D.F., Inc.,* 211 F.3d 846, 850 (4th Cir. 2000).

At the threshold, the Government argues that Appellants' constitutional claims are moot. These claims are indeed moot because (1) the consent decree entered into by the Government prospectively enjoins all of the conduct challenged by Appellants and (2) no money damages are available because a *Bivens action does not lie against either agencies or officials in their official capacity. See FDIC v. Meyer*, 510 U.S. 471, 484-86 (1994) (holding that a Bivens action is unavailable against agencies); *Randall v. United States,* 95 F.3d 339, 345 (4th Cir. 1996) ("Any remedy under *Bivens* is against federal officials individually, not the federal government."). Thus, no further effective relief can

be given Appellants on their constitutional claims because they already have complete injunctive relief and no damages are available. We therefore refrain from addressing these claims on the merits.

VII.

Because the Privacy Act requires proof of "actual damages" for an award of statutory minimum damages and because Buck Doe failed to provide sufficient evidence of actual damages to survive the Government's summary judgment motion, we reverse the district court's grant of summary judgment in Buck Doe's favor and direct on remand that summary judgment be entered in the Government's favor as to Buck Doe's claims. Because no Appellant other than Buck Doe produced any evidence of an "adverse effect" under the Act, we affirm the district court's grant of summary judgment in the Government's favor on the claims of all of the other Appellants. We affirm the district court's denial of class certification, and we decline to address as moot Appellants' constitutional claims.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

MICHAEL, Circuit Judge, concurring in part and dissenting in part:

I largely agree with the majority's ultimate disposition of most of this case, but this agreement in result cannot paper over my significant disagreement with the majority's interpretation of the Privacy Act. Most fundamentally, I respectfully dissent from the majority's conclusion in part II of its opinion that only a plaintiff who can prove actual damages is entitled to recover statutory damages under 5 U.S.C. § 552a(g)(4). Even if the statute must be narrowly construed as a waiver of sovereign immunity, it will not

bear the interpretation the majority adopts today. I would hold that a plaintiff can recover statutory damages of $1,000 upon proof that he has suffered an adverse effect as a result of an intentional or willful violation of the Privacy Act. § 552a(g)(1)(D), (g)(4). Because Buck Doe has offered sufficient evidence that he was adversely affected by the Department of Labor's wrongful dissemination of his social security number, I would remand his case for trial. I would affirm the district court's grant of summary judgment to the Secretary against the other six Doe plaintiffs on the alternative ground that those plaintiffs failed to present any evidence of adverse effects resulting from the Department's violation of the Privacy Act. I join the majority's treatment of the class certification issue in part V of its opinion except to the extent that the majority's discussion depends on its view that proof of actual damages is a prerequisite for the recovery of statutory damages.[1] I join parts IV and VI of the majority opinion in full.

I.

The principal issue in this case is whether proof of actual damages is a prerequisite to the recovery of statutory damages under the Privacy Act. Although I dissent from the majority's holding on that issue, I begin my analysis by briefly covering the ground the majority and I share. Specifically, I explain why I agree with the majority that the district court properly entered summary judgment against all the plaintiffs except Buck Doe because none of those

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[1] I agree with the majority that the plaintiffs' proposed class definition was sufficiently overbroad to fail the typicality requirement. *See ante* at 183-84. Though the district court could have narrowed the class definition on its own initiative, its failure to do so was not an abuse of discretion. *See Lundquist v. Sec. Pac. Auto. Fin. Servs. Corp.*, 993 F.2d 11, 14-15 (2nd Cir. 1993).

plaintiffs satisfied the Privacy Act's adverse effect requirement.

Subsections (A) through (C) of the Privacy Act's civil remedies provision, 5 U.S.C. § 552a(g)(1), authorize suit for certain specified violations of the Act. Subsection (D) is a catchall provision that authorizes suits against any agency that "fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual." 5 U.S.C. § 552a(g)(1)(D). Because the Does' Privacy Act claims fall under subsection (D), each of them must prove that he suffered an adverse effect as a result of the Department of Labor's wrongful disclosure of his social security number in order to have standing to sue.

A plaintiff can satisfy the adverse effect requirement in § 552a(g)(1)(D) even if he has sustained no actual damages, for the meaning of "adverse effect" in subsection (g)(1)(D) is both distinct from and broader than the meaning of "actual damages" in subsection (g)(4)(A). *See Quinn v. Stone*, 978 F.2d 126, 135 n.15 (3d Cir. 1992).[2] The district court, after adopting an extremely loose reading of the adverse effect requirement, held that all of the Does satisfied the requirement. In essence, the court read the adverse effect language in § 552a(g)(1)(D) as requiring a plaintiff to demonstrate only that the government intentionally and willfully mishandled the plaintiff's own

[2] A few courts appear to ignore the distinction between adverse effects and actual damages by holding that only proof of economic loss qualifies as an adverse effect. *See, e.g., Risch v. Henderson*, 128 F. Supp. 2d 437, 441 (E.D.Mich. 1999). This cannot be correct. Indeed, the Secretary concedes in her brief that the terms "adverse effect" and "actual damages" have different meanings. *See* Brief of Appellee/Cross Appellant Chao at 22 n.3.

personal information (as opposed to that of some third party). Most courts, however, closely scrutinize a plaintiff's claim for evidence of adverse effects in a way that conflicts with the district court's permissive approach to the requirement. *See, e.g., Quinn*, 978 F.2d at 135-37; *Albright v. United States*, 732 F.2d 181, 186-88 (D.C.Cir. 1984). As the Third Circuit has explained, the adverse effect requirement actually contains two prongs: a standing requirement (the plaintiff must have suffered a cognizable injury) and a requirement that the adverse effect be caused by the agency's violation of the Act. *See Quinn*, 978 F.2d at 135. The causal prong makes it especially clear that an adverse effect must be something distinct from the intentional and willful violation itself. For if a violation of the Privacy Act was sufficient to constitute an adverse effect, there could be no question of whether the violation *caused* the adverse effect, and hence the causal prong would be superfluous. As a result, the district court set the bar of the adverse effect requirement too low by not insisting that the Does offer evidence of adverse effects separate from, and caused by, the Department of Labor's willful and intentional violation of their Privacy Act rights.

That said, an adverse effect can take many different forms depending on which provisions of the Privacy Act have been violated. Financial harm is the most tangible adverse effect that can result from an agency's wrongful disclosure of a social security number. We have observed that an "unscrupulous individual" armed with a person's social security number "could obtain a person's welfare benefits or Social Security benefits, order new checks at a new address on that person's checking account, obtain credit cards, or even obtain the person's paycheck." *Greidinger v. Davis*, 988 F.2d 1344, 1353 (4th Cir. 1993). Obviously, a person suffers an adverse effect when his

social security number is used by another to commit some crime of identity fraud, but a plaintiff can also be adversely affected before any crime occurs by distress about possible misuse of his illegally disclosed social security number. Most courts have held that mental distress or emotional harm of this kind is sufficient to constitute an adverse effect. *See, e.g., Quinn,* 978 F.2d at 135-36 (holding that stress and emotional anguish are sufficient to establish adverse effect); *Albright,* 732 F.2d at 186 (stating that "emotional trauma alone is sufficient to qualify as an 'adverse effect' "); *Parks v. IRS,* 618 F.2d 677, 682-83 (10th Cir. 1980) (stating that psychological harm can constitute an adverse effect). It follows that, at minimum, Buck Doe proffered evidence that he had suffered adverse effects sufficient to survive summary judgment when he declared in his affidavit that "no amount of money could compensate [him] for worry and fear of not knowing when someone would use [his] name and social security number to . . . use [his] checking account or even get credit cards." If found credible by the trier of fact, Buck Doe's testimony that he worried about the possible misuse of his social security would satisfy the adverse effect requirement.

The harder question is what to do with the remaining Doe plaintiffs. Their social security numbers, like Buck Doe's, were wrongfully disclosed to strangers. Given the many troubling consequences that could flow from this disclosure, persons in their position could be expected to experience at least some degree of distress at the prospect that their social security numbers might be misused. Yet, aside from Buck Doe, none of the plaintiffs offered any evidence of such distress. The question, then, is whether we can simply presume that they have suffered emotional harms sufficient to qualify as adverse effects under § 552a(g)(1)(D). The question is not likely to arise with any frequency because

serious plaintiffs will not ordinarily fail to offer evidence that they have been harmed by agency violations of their privacy. Still, I believe that adverse effects must be proven rather than merely presumed, and the plaintiffs other than Buck Doe have failed to present evidence of adverse effects sufficient to survive summary judgment. Accordingly, I would affirm the district court's grant of summary judgment to the Secretary against the remaining Doe plaintiffs on the alternative ground that those plaintiffs failed to present any evidence that they suffered adverse effects from the agency's wrongful disclosure of their social security numbers. I now turn to the more difficult task of discussing the fate of Buck Doe's Privacy Act claim.

II.

Recovery in subsection (D) Privacy Act suits is governed by § 552a(g)(4), which provides:

> In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of-
> (A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and
> (B) the costs of the action together with reasonable attorney fees as determined by the court.

5 U.S.C. § 552a(g)(4).

The majority and I agree that to recover statutory damages under the Privacy Act, an individual must prove that he has suffered an adverse effect as a result of an agency's intentional or willful violation of the Act. We also

agree that emotional distress can qualify as an adverse effect and that Buck Doe's statements about his emotional distress are sufficient to allow a finding that he suffered an adverse effect as a result of the Department of Labor's wrongful disclosure of his social security number. Finally, we agree that proof sufficient to establish an adverse effect may be insufficient to establish actual damages. We disagree, however, on the question of whether proof of actual damages is a prerequisite to the recovery of statutory damages.

The majority holds that, purely as a matter of textual analysis, statutory damages under the Privacy Act may be recovered only by a plaintiff who can prove that he has sustained actual damages. It refrains from deciding whether the term "actual damages" can include emotional distress or is limited to out- of-pocket losses. Instead, the majority assumes for the sake of argument that proof of emotional distress could entitle a plaintiff to actual damages, but holds that Buck Doe's conclusory claims of emotional distress are insufficient. Though the question is somewhat close, the majority's textual arguments do not convince me that a "person entitled to recovery" in subsection (g)(4)(A) must be someone who has sustained actual damages. I believe the phrase "person entitled to recovery" is more naturally read to mean anyone to whom "the United States shall be liable . . . in an amount equal to the sum of" the amounts specified in subparagraphs (A) and (B). Such a person is entitled to recovery because he has proven that he suffered an adverse effect as a result of an agency's intentional or willful violation of the Privacy Act. I think it quite relevant, though the majority apparently does not, that the language in § 552a(g)(4) and similar language in other statutes has been widely read to mean exactly what I believe it means. My biggest problem with the majority's textual analysis,

however, is the majority's assumption that we can decide whether proof of actual damages is a prerequisite to the recovery of statutory damages without any attention either to the question of what the term "actual damages" means or to the policies that led Congress to create a statutory damages provision as part of the Privacy Act in the first place. In my view, expanding the scope of inquiry to include these considerations makes it clear that the statute should not be read to condition the recovery of statutory damages on proof of actual damages. Nevertheless, I will first attempt to meet the majority's analysis on its own terms by assuming with the majority that we can properly decide whether proof of actual damages is a prerequisite to the recovery of statutory damages solely by analyzing the meaning and placement of the phrase "person entitled to recovery" in subsection (g)(4)(A).

A.

1.

Section 552a(g)(4)(A) unambiguously provides that a "person entitled to recovery" shall receive at least statutory damages of $1,000. The critical textual question, of course, is who counts as a "person entitled to recovery." The majority argues that a person entitled to recovery must be someone who has sustained actual damages. In my opinion, the majority relies too heavily on where the phrase is placed in subparagraph (A) while giving insufficient emphasis to the ordinary meaning of the word "recovery." As a matter of ordinary language usage, an entitlement to "recovery" is surely broader than an entitlement to actual damages. Thus, the statute is more naturally read to say that anyone to whom the United States "shall be liable" in the amounts specified in subparagraphs (A) and (B) is a "person entitled to recovery." The majority's cramped reading of

"recovery" would make more sense if actual damages were the only remedy provided by the statute, but they are not. Instead, the text of the statute allows for a plaintiff who has proven an intentional or willful violation of the Privacy Act to recover costs and reasonable attorney fees even if the plaintiff has suffered no actual damages at all.[3] On the majority's reading, such a person is not "entitled to recovery" even though the United States is liable to that person for costs and attorney fees. A reading that so strongly conflicts with the ordinary meaning of "recovery" ought to be rejected.[4]

Three additional reasons support my reading of the statute. First, the majority of courts to interpret § 552a(g)(4) have allowed recovery of statutory damages without proof of actual damages. In fact, disagreement about this issue arose only when courts began to interpret the statute in the light of the principle that waivers of the

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[3] This would still be true even if the majority was correct in holding that a plaintiff who cannot prove actual damages will recover no damages at all. It may seem odd that a plaintiff could be entitled to costs and attorney fees without being entitled to any damages, but any apparent oddity in this result only reinforces my point that statutory damages should be available under the Act without proof of actual damages.

[4] The majority finds this argument unpersuasive. After observing that "person entitled to recovery" appears before costs and attorney fees are provided for, the majority reasons that Congress would not have made the definition of "person entitled to recovery" "dependent upon a subsequent statutory provision." *Ante* at 179. The problem with the majority's argument, however, is that on my reading the definition of "person entitled to recovery" is not dependent on a subsequent provision. Rather, a person entitled to recovery is someone to whom "the United States shall be liable ... in an amount equal to the sum of" the amounts referred to in subparagraphs (A) and (B). That language appears prior to the use of "person entitled to recovery" in subparagraph (A).

federal government's sovereign immunity must be narrowly construed. Second, my interpretation is consistent with that adopted by the Office of Management and Budget (OMB), the agency charged with implementing the Privacy Act. Third, statutory damages provisions that are similar in structure, language, and purpose to § 552a(g)(4) have been uniformly understood to allow recovery of statutory damages without proof of actual damages. Indeed, the legislative history of these provisions clearly evinces Congress's intent to allow recovery of minimum statutory damages without proof of actual damages. I will expand on each of these points.

First, most circuit courts have read the Privacy Act to allow recovery of statutory damages without proof of actual damages. *See Wilborn v. HHS,* 49 F.3d 597, 603 (9th Cir. 1995) (stating that statutory damages may be awarded to plaintiffs with no provable damages); *Quinn,* 978 F.2d at 131 (listing adverse effect, but not actual damages, as an element that must be proved in order to recover damages under the Privacy Act for wrongful disclosure of personal records); *Waters v. Thornburgh,* 888 F.2d 870, 872 (D.C.Cir. 1989) (stating that if a plaintiff can establish that he was adversely affected by an intentional or willful violation of the Act, he "is entitled to the greater of $1,000 or the actual damages sustained"); *Johnson v. Dep't of Treasury,* 700 F.2d 971, 972 & n.12 (5th Cir. 1983) (stating that the statutory minimum of $1,000 is "of course" recoverable even without proof of actual damages); *Fitzpatrick v. IRS,* 665 F.2d 327, 330-31 (11th Cir. 1982) (stating that plaintiffs who failed to prove actual damages could recover statutory damages); *Parks,* 618 F.2d at 682-83 (holding that plaintiffs who sought minimum statutory damages had stated a claim for relief when they alleged facts showing an intentional or willful violation of the Act

that caused psychological harm constituting an adverse effect); *but see Hudson v. Reno,* 130 F.3d 1193, 1207 & n.11 (6th Cir. 1997) (holding that proof of actual damages is a prerequisite to recovery of statutory damages on the ground that waivers of the federal government's sovereign immunity must be narrowly construed in favor of the government). Until today, we had assumed, albeit in dicta, that the prevailing view was correct. *See Thurston v. United States,* 810 F.2d 438, 447 (4th Cir. 1987).

The majority appears to regard the decisions favoring my reading of the Privacy Act as irrelevant because none undertakes the sort of textual analysis favored by the majority. That point is true enough, but it is worth observing that sometimes courts fail to engage in textual analysis simply because they think a point is too obvious to require discussion. Although I acknowledge that judicial head counting is not an infallible method of determining the meaning of a statute, the prevalence of my reading in the circuits is at least some evidence against the plausibility of the majority's reading. Indeed, I think we ought to be troubled that, with one possible exception, the only circuit ever to rule that a plaintiff must prove actual damages in order to recover statutory damages based its conclusion not on its reading of the text, but on the principle that waivers of sovereign immunity must be narrowly construed in favor of the government. *See Hudson,* 130 F.3d at 1207 & n.11.[5]

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[5] The D.C. Circuit's decision in *Molerio v. FBI,* 749 F.2d 815, 826 (D.C.Cir. 1984), a case that did not appeal to sovereign immunity principles, is sometimes cited as evidence that the D.C. Circuit has adopted the position that proof of actual damages is a prerequisite for the recovery of statutory damages. The precedential force of *Molerio* on this point is unclear because the D.C. Circuit has subsequently said that proof of an adverse effect *is* sufficient to recover statutory damages. *See Waters,* 888 F.2d at 872.

Second, my reading is consistent with the guidelines for implementing the Privacy Act developed by OMB. Privacy Act Guidelines, 40 Fed. Reg. 28,949 (July 9, 1975). The OMB guidelines explain that when a court

> finds that an agency has acted willfully or intentionally in violation of the Act in such a manner as to have an adverse effect upon the individual, the United States will be required to pay
>
> Actual damages or $1,000, whichever is greater
>
> Court costs and attorney fees.

Id. at 28,970. These guidelines "are due the deference accorded to the interpretation of an agency charged with 'oversight' of implementation." *Quinn,* 978 F.2d at 133. *See also* Privacy Act § 6, 88 Stat. 1896, 1909 (1974) (authorizing the OMB guidelines); *Albright,* 631 F.2d at 919-20 n.5 (explaining that the OMB guidelines are particularly worthy of deference because they " 'involve[ ] a contemporaneous construction of a statute by the [persons] charged with the responsibility of setting its machinery in motion, or making the parts work efficiently and smoothly while they are yet untried and new' " (quoting *Zenith Radio Corp. v. United States,* 437 U.S. 443, 450 (1978))).

Third, my interpretation is supported by both the legislative history and the judicial interpretation of statutory damages provisions similar in language, structure, and purpose to § 552a(g)(4). In 1976, only two years after passage of the Privacy Act, Congress created a civil remedy for unauthorized disclosure of tax returns and tax return information. As originally enacted, the statute read:

> In any suit brought under the provisions of subsection (a), upon a finding of liability on the part of the defendant,

the defendant *shall be liable* to the plaintiff in an amount *equal to the sum of—*

(1) *actual damages sustained by the plaintiff* as a result of the unauthorized disclosure of the return or return information and, in the case of a willful disclosure or a disclosure which is the result of gross negligence, punitive damages, *but in no case shall a plaintiff entitled to recovery* receive less than the sum of $1,000 with respect to each instance of such unauthorized disclosure; and

(2) the costs of the action.

26 U.S.C. § 7217(c) (Supp. 1981) (emphasis added), *repealed* 1982. While somewhat more complex than § 552a(g)(4), this statute poses essentially the same question of interpretation presented by this case, namely, is a plaintiff "entitled to recovery" someone who has sustained actual damages or is he simply someone to whom the defendant "shall be liable" in a specified sum. Congress gave its answer in the statute's legislative history, explaining its creation of a statutory damages remedy for unlawful disclosure of tax return information as follows:

> Because of the difficulty in establishing in monetary terms the damages sustained by a taxpayer as the result of the invasion of his privacy caused by an unlawful disclosure of his returns or return information, the amendment provides that these damages would, in no event, be less than liquidated damages of $1,000 for each disclosure.

S.Rep. No. 94-938, at 348 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2897, 3778. Not surprisingly, courts uniformly interpreted § 7217(c) to allow recovery of statutory damages without requiring proof of actual

damages. *See, e.g., Johnson v. Sawyer,* 120 F.3d 1307, 1313 (5th Cir. 1997) (stating that under § 7217 "a plaintiff is entitled to his actual damages sustained as a result of an unauthorized disclosure . . . or to liquidated damages of $1,000 per such disclosure"); *Rorex v. Traynor,* 771 F.2d 383, 387-88 (8th Cir. 1985) (holding that plaintiffs were entitled to minimum statutory damages under § 7217(c) despite their failure to prove any actual damages). Section 7217 was repealed in 1982 and replaced by 26 U.S.C. § 7431(c), which has also been read to authorize the award of statutory damages without requiring the plaintiff to prove actual damages. *See, e.g., Chandler v. United States,* 687 F. Supp. 1515, 1521 (D.Utah 1988).[6]

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[6] The Secretary argues that § 7431(c) does not help the Does' case because that section more clearly expresses Congress's intent to allow recovery of statutory damages without proof of statutory damages than does § 522(g)(4)(A). Section 7431(c) provides that

> the defendant shall be liable to the plaintiff in an amount equal to the sum of—
>
> (1) the greater of—
>
> (A) $1,000 for each act of unauthorized disclosure of a return or return information with respect to which such defendant is found liable, or
>
> (B) the sum of—
>
> (i) the actual damages sustained by the plaintiff as a result of such unauthorized disclosure, plus
>
> (ii) in the case of a willful disclosure or disclosure which is the result of gross negligence, punitive damages, plus
>
> (2) the costs of the action.

This section contains exactly the sort of language that the majority regards as adequate to authorize the award of statutory damages without proof of actual damages. *See ante* at 178. The majority fails to recognize, however, that both Congress and the courts apparently regard

Congress passed another provision with language similar to § 552a(g)(4)(A) as part of the Electronic Communications Privacy Act of 1986 (ECPA). Pub. L. No. 99-508, 100 Stat. 1848. The ECPA creates a civil damages remedy for persons aggrieved by knowing or intentional violations of the Act:

> The court may assess as damages in a civil action under this section the sum of the *actual damages suffered by the plaintiff* and any profits made by the violator as a result of the violation, *but in no case shall a person entitled to recover* receive less than the sum of $1,000.

18 U.S.C. § 2707(c) (emphasis added). As with the statutory damages provisions in the tax code and the Privacy Act, it could be argued that the placement of the phrase "person entitled to recover" identifies such a person as one who has suffered actual damages. Yet Congress explained that appropriate remedies under this section include "damages . . . including the sum of actual damages suffered by the plaintiff and any profits made by the violator as the result of the violation . . . with minimum statutory damages of $1,000." S. Rep. No. 99-541, at 43 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3597. And, as with the tax statute and (with a few exceptions) the Privacy Act, this language

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the language in the new § 7431 as interchangeable with that of its predecessor. Section 7217 was replaced by § 7431 as part of a comprehensive tax reform bill in 1982, *see* Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324, and the legislative history provides no indication that the new section was meant to change the operation of the statutory damages remedy. Courts have treated the two statutes interchangeably, *see, e.g., Flippo v. United States*, 670 F. Supp. 638, 642 (W.D.N.C. 1987) (using committee report regarding § 7217 to interpret § 7431), and have uniformly interpreted both versions of the statute to award minimum statutory damages without proof of actual damages.

has not led courts to condition the recovery of minimum statutory damages on proof of actual damages. *See, e.g., United Laboratories, Inc. v. Rukin*, 1999 WL 608712, at *5 (N.D.Ill. 1999) (stating that under § 2707(c) a plaintiff is entitled to the greater of actual damages or $1,000 because of "the difficulty in proving actual damages caused by any particular [violation of the Act]."). Indeed, one district court in this circuit has drawn an analogy between the statutory damages provisions in the Privacy Act and the ECPA. *See Dawson v. Leewood Nursing Home, Inc.*, 14 F. Supp. 2d 828, 832 (E.D.Va. 1998) (describing both acts as rewarding plaintiffs with minimum statutory damages when they achieve "symbolic victories" by proving that the defendant violated the statute.).

The statutory damages provisions in the Internal Revenue Code and the ECPA confirm that it is not unusual for Congress to use "entitled to recovery" language to identify those plaintiffs who are entitled to minimum statutory damages. Nor is it unusual for Congress to do so in the very same sentence authorizing recovery of actual damages. What is unusual is the majority's decision to treat this language as conditioning recovery of statutory damages upon proof of actual damages.[7]

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[7] The majority criticizes my use of the legislative history of the statutory provisions in the Internal Revenue Code and the ECPA to illuminate the meaning of § 552a(g)(4)(A). According to the majority, *see ante* at 178 n.2, our decision in *Sigmon Coal Co. v. Apfel*, 226 F.3d 291, 308 n.7 (4th Cir. 2001), indicates that it is "dubious" to rely on Congress's intent in enacting one statute to discover "the intent of another Congress in enacting a separate, unrelated statute." This observation made sense in the context of *Sigmon*, but it has little bite here. In *Sigmon* we rejected an argument that unambiguous language in one provision of the Coal Act should be interpreted in a manner consistent with our earlier interpretation of a differently worded provision in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

In sum, the case for my reading of the phrase "person entitled to recovery" is a simple one. First, the ordinary meaning of the word "recovery" suggests that any person to whom the United States shall be liable in specified amounts is a person entitled to recovery. Second, Congress and other courts have indicated that they understand the language of this statute and others like it to mean exactly what I believe it means.

2.

The majority offers four reasons for its contrary view that a person entitled to recovery must be one who has sustained actual damages. First, it argues that as a matter of statutory interpretation and grammar, only a person who has

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Compare 26 U.S.C. § 9701(c)(2)(A) (a provision of the Coal Act at issue in *Sigmon*) *with* 42 U.S.C. § 9601 (a provision of CERCLA at issue in *United States v. Carolina Transformer Co.*, 978 F.2d 832, 837-38 (4th Cir. 1992)). Here, the language of the Privacy Act's statutory damages provision is strikingly similar to that of the analogous provisions in the tax code and the ECPA. Consequently, we ought, if at all possible, to give the language of all three statutes a consistent interpretation. *Cf. Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring in the judgment) (stating that a statute should be interpreted in a manner "most compatible with the surrounding body of law into which the provision must be integrated—a compatibility which, by a benign fiction, we assume Congress always has in mind"). This means that the statutory damages provisions in the tax code and the ECPA—including their legislative history—have significant implications for our interpretation of the Privacy Act. The point is especially clear in the case of 26 U.S.C. § 7217(c), the original statutory damages provision in the tax code. If, as the majority claims, Congress had really intended to require proof of actual damages as a prerequisite to the recovery of statutory damages in § 552a(g)(4)(A), I find it difficult to believe that Congress would have chosen to use essentially the same language only two years later in the tax code to authorize the recovery of statutory damages *without* proof of actual damages.

sustained actual damages can be a "person entitled to recovery" because the phrase appears in the same sentence and subparagraph that authorizes the recovery of actual damages. Second, the majority argues that the separation of the two clauses in subsection (g)(4)(A) by the conjunction "but" "reinforce[s] the conclusion that the second clause ('in no case shall a person entitled to recovery receive less than the sum of $1,000') adds a qualification with respect to the class of plaintiffs defined by the first (those who have suffered actual damages)—namely, that in no event shall such a person recover less than $1,000." *Ante* at 178. Third, the majority suggests that it would be odd for Congress to limit the liability of the United States to actual damages and then in the same sentence authorize recovery in the complete absence of actual damages. Finally, the majority suggests that Congress's failure to clearly authorize the award of statutory damages without proof of actual damages when it could easily have done so underscores the correctness of the majority's interpretation. I find none of these reasons convincing.

The majority's first argument turns on the placement of the phrase "person entitled to recovery." Although the majority is aware that the word "recovery" would normally include more than actual damages, it contends that the ordinary meaning of the word must give way because the statute implicitly redefines "recovery" to mean "actual damages" simply by placing the word "recovery" in the same sentence and subparagraph that authorizes an award of "actual damages sustained."[8] According to the majority,

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[8] The majority's characterization of subparagraph (A) as having the "sole and entire purpose" of "limit[ing] the liability of the United States to actual damages sustained," *ante* at 177, is simply a case of oversell. The subparagraph's purpose is more neutrally described as specifying the amount of damages to be recovered by a plaintiff to whom the

this placement establishes as a matter of statutory interpretation and grammar that a person entitled to recovery must be one who has sustained actual damages. The majority ought to find this claim puzzling. I would think it highly unusual for Congress to narrow the meaning of ordinary words simply through syntax. If Congress intended for "recovery" to mean "actual damages," why didn't it just say "actual damages" instead of using a word with a different (and broader) meaning and then implicitly redefining it through its placement in subparagraph (A)? Such a procedure is hardly "simple" or "straightforward." *Ante* at 178. In any event, the majority's argument fails because its intuitions about the effect of placing the phrases "actual damages sustained" and "person entitled to recovery" in the same subparagraph do not seem to be shared by other courts or by Congress. If the majority's argument worked in this case, it would be equally effective when applied to the analogous statutory damages provisions in the tax code and the ECPA. Yet, as I have just pointed out, courts have repeatedly read the language of these statutes to allow the recovery of statutory damages without proof of actual damages. More powerfully still, Congress indicated in legislative history that it intended for the very similar language in those statutes to allow recovery of statutory damages without proof of actual damages. It is unsurprising, then, that most courts have taken it for granted that § 552a(g)(4) permits the recovery of statutory damages without proof of actual damages.

United States is liable. Further, the "sole and entire purpose" of the subparagraph cannot be to limit recovery to actual damages sustained because the statutory minimum means that some plaintiffs will recover more than their actual damages. That is the whole point of the statutory minimum.

The majority's second argument, which is based on the use of the conjunction "but" to connect the two clauses of subparagraph (A), fares no better. For a start, it has the same difficulty as the first argument because neither courts nor Congress appear to recognize the rule of grammar proposed by the majority. Again, the statutory damages provisions in both the tax code and the ECPA contain the same language relied upon by the majority, yet courts have read those provisions—with Congress's blessing—to authorize the recovery of minimum statutory damages without proof of actual damages. Further, I am unconvinced that the use of the conjunction "but" must mean that the second clause in subparagraph (A) refers to the same class of persons identified in the first clause, namely, individuals who have sustained actual damages. If that had been Congress's intent, it would likely have used the same language in both clauses by saying, "but in no case shall an individual who has sustained actual damages receive less than the sum of $1,000." Instead, Congress used the phrase "person entitled to recovery" and began the clause containing that phrase with the words "but in no case." This suggests discontinuity between the two clauses. The explanation of the discontinuity is that Congress meant to signal that the phrase "person entitled to recovery" is intended to refer not to an individual who has sustained actual damages, but to anyone to whom the United States "shall be liable" in specified amounts.

The majority's third argument is that it makes no sense to believe that Congress would limit recovery to actual damages in subparagraph (A) and then, in the very same sentence, authorize the award of $1,000 to plaintiffs who have proven no actual damages at all. I have two responses to this argument. First, my reading of the statute does not, of course, authorize the award of statutory damages to a

plaintiff totally unharmed by an agency's violation of the Privacy Act. A plaintiff must still satisfy the adverse effect requirement. Second, it is not unprecedented for Congress to provide for an award of statutory damages in the absence of provable actual damages. As I have already explained, Congress did exactly that when it created a civil remedy for unauthorized disclosure of tax return information "[b]ecause of the difficulty in establishing in monetary terms the damages sustained" as a result of such disclosures. S. Rep. No. 94-938, at 348. The same rationale explains why Congress would create a statutory damages remedy in the Privacy Act for those failing to prove actual damages. Indeed, the prevalence of my interpretation of § 552a(g)(4) in the courts partly reflects the fact that the remedy of minimum statutory damages is a fairly common feature of federal legislation. *See* 26 U.S.C. 7217(c) (Supp. 1981) (current version at 26 U.S.C. § 7431(c)) (providing minimum statutory damages for unlawful disclosures of tax return information); 18 U.S.C. § 2707(c) (providing minimum statutory damages for violations of the ECPA); 15 U.S.C. § 1640(a) (providing minimum statutory damages remedy for violations of the Truth in Lending Act). In contrast, I am not aware of any statute in which Congress has "provide[d] for a 'statutory minimum' to actual damages." *Ante* at 177.

The majority also offers a fourth reason in support of its interpretation of § 552a(g)(4)(A), though it does not regard the argument as necessary to its conclusion. According to the majority, my reading of the statute is unpersuasive because if Congress had intended to allow recovery of statutory damages without proof of actual damages, it could easily have written that the United States shall be liable "in an amount equal to the sum of (A) whichever is greater: actual damages sustained by the individual as a result of the

refusal or failure, or $1,000." *Ante* at 178. It is equally true, however, that if Congress had intended to condition the recovery of statutory damages on proof of actual damages, it could have easily drafted subparagraph (A) to say that "in no case shall an individual who has sustained actual damages receive less than the sum of $1,000." In short, the majority's fourth argument simply underlines the point that show that Congress intended to condition the recovery of minimum statutory damages upon proof of actual damages.

To sum up, I believe that on balance the better reading of the statute is that any person to whom the United States shall be liable for its intentional or willful violations of the Privacy Act is a person entitled to recovery. Even if the majority is correct that the use of "person entitled to recovery" to mean any person to whom the United States shall be liable is poor statutory draftsmanship, Congress signaled in the legislative history of the statutory damages provisions in the tax code and the ECPA that it thinks otherwise. It is not our place to say that language Congress has repeatedly used to authorize the recovery of statutory damages without proof of actual damages is inadequate to that task.[9]

3.

Like the majority, however, I must acknowledge that my reading of the statute is not inevitable. This brings me to the majority's fall-back position. It argues that, at worst, the statute is ambiguous and that its interpretation should prevail by virtue of the principle that waivers of the federal government's sovereign immunity must be narrowly

[9] I would quickly add that, as I noted above, Congress is at least as guilty of poor draftsmanship on the majority's reading of the statute as it is on mine.

construed, a principle I will refer to as the "sovereign immunity canon." This argument raises several potentially complicated questions. First, I have some doubts about whether the sovereign immunity canon should even apply in the circumstances of this case.[10] Even conceding that the

[10] The Supreme Court has primarily used the sovereign immunity canon to answer questions about whether a lawsuit may be brought at all or about the availability of certain forms of relief, not to decide what a plaintiff must prove to obtain relief that has been unequivocally authorized. *See, e.g., Lane v. Pena,* 518 U.S. 187, 196-97 (1996) (using canon to decide whether plaintiff could recover monetary damages from the federal government); *Irwin v. Dep't of Veterans Affairs,* 498 U.S. 89, 94-96 (1990) (using canon to decide whether statute of limitations may be equitably tolled in action against the federal government); *Library of Congress v. Shaw,* 478 U.S. 310, 318-21 (1986) (using canon to decide whether plaintiff could recover interest award in action against the federal government). Indeed, the Court recently suggested that when Congress has clearly provided for a damages remedy, some subsidiary questions about the proper administration of that remedy might be properly answered without reference to the sovereign immunity canon. *See West v. Gibson,* 527 U.S. 212, 222 (1999). In short, it is not clear that the Supreme Court intends for the sovereign immunity canon to be used to answer *every* question of statutory interpretation that could affect the federal government's legal liability. Consequently, it is not surprising that most of the courts to interpret § 552a(g)(4)(A) have done so without reference to the sovereign immunity canon. Moreover, it is simply bad law to apply the sovereign immunity canon to questions of statutory interpretation that determine the availability of relief to a particular plaintiff in a particular circumstance. To insist on a clear statement at this level of detail places unrealistic demands on congressional drafting and threatens to frustrate congressional intent. *See* John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules,* 1995 Wis. L. Rev. 771, 819-22 (1995). These considerations make me doubt the wisdom of applying the sovereign immunity canon in this case, and I fear that after today's decision it is only a matter of time before the government begins asking us to apply the canon to such questions as whether a particular set of consequences counts as an adverse effect under § 552a(g)(1)(D) or whether a particular manner of releasing personal information counts as an agency disclosure under § 552a(b).

canon applies, I am not sure what it means to say that a statute must be narrowly construed in favor of the sovereign. It is, of course, clear that we must accept the narrower of two equally convincing interpretations; but it is far from clear exactly how much better one interpretation must be before it can prevail over another interpretation. *Cf.* Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws,* in *A Matter of Interpretation: Federal Courts and the Law* 28 (Amy Gutmann ed., 1997) (stating that rules that weight the scales of interpretation in favor of a particular result make it "virtually impossible to expect uniformity and objectivity" in statutory interpretation because such rules "add [ ], on one or the other side of the balance, a thumb of indeterminate weight"). I need not explore these questions in any detail, however, because I believe that policy considerations decisively tip the scales in favor of my interpretation. Specifically, the majority's position undermines Congress's purposes in creating a statutory damages remedy as part of the Privacy Act by making that remedy unavailable to many of its intended beneficiaries. For the reasons I explain below, I conclude that my reading must be preferred to the majority's even if the sovereign immunity canon applies.

B.

I noted above that aside from my objections to the majority's textual arguments, I disagree with the majority's apparent assumption that we can sensibly decide whether proof of actual damages is a prerequisite to the recovery of statutory damages without any consideration of what "actual damages" means or what policies led Congress to create a statutory damages remedy as part of the Privacy Act in the first place. In my view, we cannot properly interpret the

statute without identifying the policy consequences of the majority's position and asking whether Congress could have intended these consequences. The consequences of conditioning the recovery of statutory damages upon proof of actual damages vary depending on the meaning of "actual damages." If "actual damages" includes only pecuniary losses, then statutory damages are unavailable to plaintiffs who have suffered only emotional distress even though such distress is the typical injury caused by invasions of privacy. If "actual damages" also includes emotional distress that is both "demonstrable" and "sufficiently articulated" under the standards in *Price v. City of Charlotte*, 93 F.3d 1241, 1254 (4th Cir. 1996), then statutory damages are unavailable to plaintiffs who have suffered minor emotional distress that could support only an award of nominal damages under 42 U.S.C. § 1983.[11] I believe the majority's argument must be wrong because, on either of these interpretations of "actual damages," conditioning the availability of the statutory damages remedy upon proof of actual damages limits the availability of that remedy more sharply than Congress intended. To see why this is so, it is necessary to say more about Congress's reasons for creating a statutory damages remedy as part of the Privacy Act.

Section 552a(g), the civil remedies section of the Privacy Act, protects citizens against government invasions of their

[11] There is a third possibility that I need not discuss in detail. If "actual damages" includes any evidence of emotional distress credited by a trier of fact, statutory damages are unavailable only to a plaintiff who cannot show that he suffered even minor emotional distress as a result of an agency's violation of his privacy. Under this option, any proof of emotional distress sufficient to qualify as an adverse effect will count as actual damages. Thus, this position is indistinguishable in practice from my position that proof of an adverse effect is sufficient to recover statutory damages.

privacy by creating a "self-help enforcement program. . . [designed to] encourage[ ] the filing of lawsuits." *Parks*, 618 F.2d at 685. *See also* Privacy Act § 2(b)(6), 88 Stat. at 1896; S. Rep. No. 93-1183, at 83 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6916, 6997 (stating that the civil remedies provision in the Privacy Act was "designed to encourage the widest possible citizen enforcement through the judicial process . . . [which was necessary because] the Act does not give any administrative body authority to ensure compliance with the Act"). To understand why Congress chose to create a statutory damages floor as part of this private enforcement scheme, we need only look to Congress's purpose in enacting similar statutory damages provisions. We explained this purpose in *Scrimgeour v. IRS*, 149 F.3d 318 (4th Cir. 1998):

> [T]he $1,000.00 statutory damage award specified in I.R.C. § 7431(c)(1)(A) is included for the benefit of taxpayers. Actual damages for the invasion of privacy that occurs when tax returns are wrongfully disclosed can be hard to quantify. In order to encourage taxpayers to act as "private attorneys general" and pursue suits against the IRS for violations of I.R.C. § 6103, Congress enacted the statutory damages provision to ensure that in meritorious cases of wrongful release a taxpayer would not walk away from the courthouse empty handed for failure of proving actual damages.

Id. at 327 n.11. *See also supra* at 190, 192 (citing the legislative history of the statutory damages provisions in the Internal Revenue Code and the ECPA). In short, Congress creates statutory damages remedies because it wants to encourage civil enforcement suits in situations where actual

damages are difficult to prove.[12] As we observed in *Scrimgeour*, the danger that plaintiffs with meritorious cases will "walk away from the courthouse empty handed" is especially great when the wrong to be remedied is the invasion of privacy because damages arising from that wrong can be hard to quantify. This is because the typical injury caused by invasions of privacy is mental distress. *See Time, Inc. v. Hill*, 385 U.S. 374, 384-85 n.9 (1967); *Johnson*, 700 F.2d at 977. If these are the reasons why Congress created the statutory damages remedy in § 552a(g)(4)(A), it is difficult to understand why Congress would have conditioned the availability of that remedy on the plaintiff's ability to prove either economic harm or the kind of emotional harm that could support a substantial emotional damages award under the standards articulated in *Price v. City of Charlotte*.

The implausibility of the majority's interpretation of the Privacy Act is especially clear if the term "actual damages" includes only pecuniary harms. Even the Secretary acknowledges that Congress created a self-help enforcement scheme to protect citizens against government invasions of privacy and that Congress included a statutory damages remedy within that scheme to ensure that citizens with little or no provable damages would have an incentive to sue. Because mental or emotional distress is the typical injury

[12] Because the legislative history of the Privacy Act contains no explicit discussion of Congress's decision to include a statutory damages remedy in § 552a(g)(4), *see Johnson*, 700 F.2d at 981 n.25, I am admittedly assuming that Congress's purpose here was the same as its purpose in creating similar statutory damages remedies. Because the statutory damages provisions in the Privacy Act and the tax code both aim at the same harm—the invasion of privacy caused by government disclosures of personal information—I believe this assumption is warranted.

caused by invasions of privacy, it makes no sense to believe that Congress would undercut the force of its statutory damages remedy by refusing to make statutory damages available to citizens who suffered only emotional injuries. I conclude that if actual damages under the Act are limited to out-of-pocket losses, the majority's claim that proof of actual damages is a prerequisite to the recovery of statutory damages must be wrong.[13]

Though the question is closer, I also believe that the majority's reading of the Act is untenable even if "actual damages" includes emotional distress sufficient to satisfy the standards in *Price v. City of Charlotte*. According to the majority, a plaintiff's "conclusory" testimony about his emotional distress, even if believed by the trier of fact, is not sufficient to recover statutory damages. The plaintiff's testimony must establish that he "suffered demonstrable emotional distress, which must be sufficiently articulated." *Price*, 93 F.3d at 1254.

I appreciate the need for the sort of inquiry *Price* demands in assessing substantial damages awards based solely on the plaintiff's own testimony regarding his emotional distress. In the context of the Privacy Act, I have no difficulty with the claim that a person who seeks to recover emotional distress damages in excess of the $1,000

[13] Like the majority, I need not reach the difficult question of the meaning of "actual damages," a question that has been extensively analyzed by the Fifth and Eleventh Circuits. *See Johnson*, 700 F.2d at 974-86; *Fitzpatrick*, 665 F.2d at 329-31. I simply point out that if the Secretary is correct in her contention that "actual damages" includes only out-of-pocket losses, proof of actual damages cannot be a prerequisite to the recovery of statutory damages. Conversely, I believe that the majority's holding commits this circuit to the position that the term "actual damages" includes at least emotional distress that would qualify as "demonstrable" under *Price*.

statutory minimum should be required to bring forward the sort of proof that *Price* demands. A reviewing court must be able to satisfy itself both that some actual injury has occurred and that the jury has not simply been left to speculate about the proper amount of damages. In addition, the legislative history of the Privacy Act suggests that Congress worried about the possibility that juries would simply pull damages numbers out of the air based not on the actual harms suffered by the plaintiff, but on the jury's judgment about the gravity of the government's violation of the Privacy Act. *See Johnson,* 700 F.2d at 983-85 (suggesting that Congress used the term "actual damages" in the Privacy Act to emphasize that a plaintiff could not recover presumed damages based simply on the fact that his privacy had been invaded). This worry is appropriately addressed by the *Price* framework.[14]

It is an altogether different matter, however, to make the *Price* framework the standard for deciding when a Privacy Act plaintiff may recover minimum statutory damages. The problem with this approach is that, even on the most restrictive reading, the statute plainly awards $1,000 in statutory damages to a plaintiff who can prove $1, or even one penny, of actual damages. The *Price* framework was simply not designed to help courts decide whether a plaintiff's testimony adequately supports damages awards

[14] In many jurisdictions plaintiffs may recover presumed damages (substantial damages awards without proof of actual pecuniary or emotional harm) for dignitary torts such as the invasion of privacy. *See* 2 Dan B. Dobbs, *Law of Remedies* § 7.1 (2d ed. 1993). Dobbs suggests that § 552a(g)(4)(A) of the Privacy Act can best be understood as the statutory equivalent of presumed damages. *Id.* at § 7.3(4). In other words, the suggestion is that Congress wished to incorporate some of the force of the common law doctrine of presumed damages for dignitary torts while placing limits on jury discretion.

for such small sums. Consider the various factors that *Price* regards as adequate corroboration of emotional distress: "medical, psychological, or psychiatric treatment, the presence of physical symptoms, loss of income, and impact on the plaintiff's conduct and lifestyle." *Ante* at 182. I think it highly unlikely that any plaintiff would seek medical, psychological, or psychiatric treatment, lose income, or undergo a change of lifestyle because of one dollar's worth of emotional distress. Physical symptoms (sleeplessness, for example) might be present even in very minor cases of emotional distress, but then again they might not. All these factors are of course relevant to deciding whether a plaintiff experienced significant emotional distress—the kind that could support a substantial compensatory damages award. But they have little to say about whether claims of very minor emotional distress are genuine, and the majority agrees that if emotional distress counts as "actual damages" at all, proof of very minor emotional distress entitles the plaintiff to statutory damages under the Privacy Act. *See ante* at 177 (stating that statutory damages are available under the Act "where actual damages are greater than $0 but less than $1,000"). The *Price* framework is unhelpful in evaluating claims of very minor emotional distress for a simple reason: no plaintiff in a lawsuit under § 1983 (or any other cause of action without a statutory damages provision) ever sets out to prove that he suffered one dollar's worth, let alone one penny's worth, of emotional distress. When a plaintiff winds up with nominal damages, this means either that he conceded the absence of actual injury and sought to vindicate an abstract right or that he sought substantial damages and lost. A nominal damages award surely does not mean that the plaintiff has tried, but

failed, to prove that he suffered one dollar's worth of emotional distress.[15]

This point is not undercut by the majority's appeal to *Carey v. Piphus,* 435 U.S. 247 (1978). According to the majority, a plaintiff who would be entitled only to nominal damages has sustained no actual damages because nominal damages "are designed to vindicate legal rights 'without proof of actual injury.'" *Ante* at 181 (quoting *Carey,* 435 U.S. at 266 (1978)). The majority accurately states one purpose of awarding nominal damages, but it does not follow that an award of nominal damages signals the complete absence of actual injury. Nominal damages are also awarded "in cases where, although there has been a real injury, the plaintiff's evidence entirely fails to show its amount." *Black's Law Dictionary* 392 (6th ed. 1990). *See also* Restatement (Second) of Torts § 907 cmt. c (1979) ("Nominal damages are properly awarded when, although the claimant shows significant harm, its amount is not

[15] The majority faults me for characterizing the *Price* framework as a tool for reviewing damages awards that exceed "some relatively high threshold of 'substantiality,'" *ante* at 180 n.6, and insists that *Price* is an appropriate framework for determining whether *any* award of more than nominal damages for emotional distress is warranted. I acknowledge that the notion of a "substantial" damages award is somewhat vague, so perhaps some clarification is in order. Any award over the statutory minimum of $1,000 qualifies as "substantial," and perhaps the criteria in *Price* might also be useful in evaluating awards of considerably less than $1,000. (It bears noting, however, that no case of which I am aware has used *Price* to vacate a jury award for emotional distress of less than $1,000.) In contrast, an award of $1.00 in actual damages for emotional distress is not "substantial" on any account. In saying that the *Price* framework is designed to evaluate "substantial" damages awards, my primary point is that *Price* is not helpful in deciding when a plaintiff has suffered the one dollar's worth (or even one penny's worth) of actual damages that should warrant the recovery of statutory damages even on the majority's reading of the Privacy Act.

proved with sufficient certainty to entitle him to an award of compensatory damages."). Here, the fact that Buck Doe would be entitled to only nominal damages in a § 1983 case simply indicates that a jury could not reasonably make a substantial damages award on the basis of his somewhat limited testimony regarding his emotional distress because any attempt to do so would be unduly speculative. It does not mean that he suffered no injury at all.

The problems with the majority's approach are well illustrated by its treatment of Buck Doe's Privacy Act claim. In holding that Buck Doe has produced evidence of adverse effects sufficient to survive summary judgment, the majority acknowledges that a reasonable trier of fact could credit Buck Doe's testimony about his emotional distress and could determine that he really did experience some degree of anxiety about the possibility that others would misuse his social security number. It follows that Buck Doe has presented evidence that he suffered an "injury in fact," *ante* at 181 n.6, and that a reasonable factfinder could conclude that he has established more than a merely technical invasion of his rights. This point makes it very difficult to understand the majority's conclusion that Buck Doe nonetheless failed to present evidence of "actual damages" sufficient to survive summary judgment. The majority appears to hold that even though a reasonable factfinder could conclude that Buck Doe suffered some genuine emotional distress (that he was telling the truth when he claimed that he worried about possible misuse of his social security number), no factfinder could reasonably conclude that this emotional distress warranted even one penny of compensatory damages. I do not see how this position can be correct. In other words, I do not see any room to draw a line between proof of emotional distress sufficient to constitute an adverse effect and proof of emotional distress

sufficient to establish a penny's worth of actual damages. Certainly *Price* cannot help courts to make this sort of distinction. As a result, I conclude that the majority's adoption of *Price* as the measure of when a plaintiff's emotional distress proves "actual damages" simply raises the bar for recovering statutory damages higher than Congress meant to put it by placing that remedy beyond the reach of plaintiffs who suffer very minor emotional harms.

In responding to the foregoing argument, the majority appears to acknowledge, even to embrace, this consequence of its position. It suggests that the denial of statutory damages to plaintiffs who have suffered only emotional injuries that are "very minor" or not "meaningful," *ante* at 181 n.6, is simply the price of the actual damages requirement's "gatekeeping function of avoiding tremendous over-compensation of plaintiffs," *id.* In response, my first point is that I do not see how the idea that a plaintiff must prove "meaningful" or more than "very minor" emotional distress can be squared with the majority's recognition that, even on its own reading of the Act, proof of any amount of actual damages greater than zero is enough to trigger the statutory damages remedy. *See ante* at 177. Few would describe emotional harms warranting one dollar's worth of compensatory damages as "meaningful," yet such harms would be sufficient to merit statutory damages under § 552a(g)(4)(A) even if the majority was correct that proof of actual damages is a prerequisite to the recovery of statutory damages. Second, I think that any purpose Congress might have had of avoiding "tremendous overcompensation" of plaintiffs is adequately served by requiring plaintiffs to prove they have suffered an adverse effect as a result of the government's invasion of their privacy. *Cf. Fitzpatrick*, 665 F.2d at 330 (explaining that the $1,000 minimum damages floor is meant to "avoid a

situation in which persons suffering injury had no provable damages and hence no incentive to sue" (emphasis added)).

The majority has a further rejoinder to these points, however. It argues that because the "'actual damages' requirement" is both distinct from and more demanding than the adverse effect requirement, very minor emotional harms sufficient to count as adverse effects must be insufficient to count as actual damages. *Ante* at 180-81 n.6. I agree with the majority that a convincing interpretation of the statute must explain why Congress chose to use two terms, "adverse effect" and "actual damages," when it could have used one. I also agree that if the term "actual damages" includes emotional distress, the showing of emotional distress necessary to satisfy any actual damages requirement imposed by the Privacy Act would have to be greater than the showing necessary to satisfy the adverse effect requirement. To my mind, however, these points cut the other way and simply reinforce my argument that the Privacy Act does not contain an actual damages requirement at all. Rather, it awards minimum statutory damages upon proof of an adverse effect suffered as a result of an agency's willful or intentional violation of the Privacy Act. In addition, it creates an actual damages remedy by allowing recovery of proven actual damages in excess of the $1,000 statutory minimum. On my reading, then, the showing needed to recover proven actual damages for emotional distress is of course greater than that needed to satisfy the adverse effect requirement.[16]

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[16] There is, of course, another way to explain why Congress chose to use the term "adverse effect" as well as the term "actual damages." The Act could be read to say that emotional distress is an adverse effect, that proof of an adverse effect is sufficient to recover statutory damages, and that "actual damages" includes only pecuniary harms. On this reading, plaintiffs who suffer only emotional distress as a result of willful and

To put the point in another way, the majority cannot produce a satisfying interpretation of the Act by claiming both that the Privacy Act imposes an actual damages requirement and that the term "actual damages" can include emotional distress. If even very minor emotional distress counts as "actual damages," there seems to be no distinction between the adverse effect requirement and the actual damages requirement. As the majority points out, this result seems wrong because it fails to explain why Congress created two requirements rather than one. The majority avoids this problem by holding that only emotional distress satisfying the *Price* criteria counts as actual damages. This creates a gap between the adverse effect requirement and the actual damages requirement, but it does so only by making the statutory damages remedy unavailable to plaintiffs who have suffered very minor emotional harms. I do not think this result can be squared with Congress's intent in creating the statutory damages remedy, for the text of the Privacy Act indicates that if Congress created an actual damages requirement at all, that requirement should be satisfiable by proof of one dollar's worth (or even one penny's worth) of actual damages. The better course is simply to abandon the idea that proof of actual damages is a prerequisite to the recovery of statutory damages.

In sum, the majority's claim that proof of actual damages is a prerequisite to the recovery of statutory damages is inconsistent with Congress's intent in creating a statutory damages remedy for agency violations of citizens' privacy, and this is so regardless of whether the term "actual

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intentional violations of the Privacy Act recover $1,000—no more and no less—while plaintiffs who can prove pecuniary harms in excess of $1,000 recover the full amount of these "actual damages." This seems to be the reading adopted by the Eleventh Circuit in *Fitzpatrick*.

damages" is limited to out-of-pocket losses or includes emotional distress. This conclusion follows from three basic points about the Privacy Act. First, Congress created the statutory damages remedy as an incentive to suit because it recognized that damages from government invasions of privacy are hard to prove. Second, Congress recognized that the typical injury caused by the invasion of privacy is emotional distress. Third, Congress intended for the statutory damages remedy to be available to plaintiffs who suffered even very minor harms as a result of the government's intentional or willful invasion of their privacy. If these three points are accepted, as I think they must be, Congress could not have intended to condition the recovery of statutory damages upon proof of actual damages. The point is especially clear if "actual damages" means out- of-pocket losses, for it would be senseless for Congress to create a statutory damages remedy in order to encourage citizen enforcement of the Privacy Act and then condition the availability of that remedy upon proof of economic losses when the typical injury caused by invasions of privacy is emotional distress. Though the question is closer, I think the claim that proof of "demonstrable" emotional distress under *Price* is needed to recover statutory damages is also untenable. The problem with this claim is that the *Price* framework is intended to help courts decide when a plaintiff has suffered the kind of emotional distress that can support a substantial damages award. When that framework is used to decide whether a plaintiff is entitled to statutory damages, the inevitable result is that plaintiffs who suffer very minor harms will go uncompensated. This cannot have been Congress's intent, for if Congress had intended to impose an actual damages requirement at all, the text of § 552a(g)(4)(A) indicates that any amount of actual damages would be sufficient to trigger the statutory damages remedy.

Accordingly, I would hold that proof of actual damages is not a prerequisite for the recovery of statutory damages under § 552a(g)(4)(A). A plaintiff who proves that he has suffered an adverse effect as a result of an agency's willful or intentional violation of the Act is entitled to the statutory damages remedy. A plaintiff may, of course, recover any proven actual damages in excess of $1,000.

III.

In conclusion, I respectfully dissent from the majority's holding in part II of its opinion that actual damages are a prerequisite for the recovery of statutory damages under the Privacy Act and from its consequent decision to grant summary judgment to the Secretary against Buck Doe. I concur in the majority's affirmance of the entry of summary judgment against the other Doe plaintiffs because they failed to show they had suffered any adverse effects as a result of the Department of Labor's wrongful disclosure of their social security numbers. Finally, I would order a remand for a trial in Buck Doe's case.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

ROBERT DOE, a/k/a VIRGINIA PRIVACY LITIGATION, et al.,	)	
Plaintiffs,	)	CIVIL ACTION NO. 2: 97CV00043
v.	)	
ALEXIS M. HERMAN SECRETARY OF LABOR,	)	FINAL ORDER
Defendant.	)	

This case was referred pursuant to 28 U.S.C. § 636(b)(1)(B) to the Honorable Pamela Meade Sargent, United States Magistrate Judge. The Magistrate Judge filed a report, dated May 24, 2000, recommending that the Plaintiffs' Motion to Amend Complaint and File Affidavits in Support of Damages be denied. The Plaintiffs subsequently filed objections to the report and recommendation, and the court, upon a *de novo* review of the record, is of the opinion that the report should be adopted.

The Magistrate Judge also filed a report dated October 29, 2000 recommending that the Plaintiffs' Motion to Certify Class Action and Motion for Summary Judgment be denied and the Defendant's Motion for Summary Judgment be granted as to each named Plaintiff except Buck Doe. Both sides filed objections to this report and recommendation, and the court, upon a *de novo* review of the record, is of the opinion that this report should be adopted in part and reversed in part. This court sustains the

recommendation to deny the Plaintiffs' Motion to Certify Class Action and Motion for Summary Judgment for all named Plaintiffs, except Buck Doe. Thus, this court reverses the report in part by granting Buck Doe's Motion for Summary Judgment. The court also sustains the report's recommendation to grant the Defendant's Motion for Summary Judgment against every named Plaintiff except Buck Doe.

FACTS AND PROCEDURAL HISTORY

Plaintiff Robert Doe, et al., ("Plaintiffs") have filed these consolidated actions against the Defendant, the Secretary of the United States Department of Labor ("Department").[1] The Plaintiffs assert that the Department frequently violated the Privacy Act, 5 U.S.C. § 552a (1994), by collecting and disseminating their social security numbers and other personal information to a multitude of non-governmental parties while in the process of administering the Federal Black Lung Benefits Act of 1981, 30 U.S.C. § 901 *et seq.* (1994). The matters currently before this court are the Plaintiffs' Motion to Certify Class Action, (Docket Item No. 23), cross motions for summary judgment, (Docket Items Nos. 11, 21), and the Plaintiffs' Motion to Amend Complaint and File Affidavits in Support of Damages, (Docket Item No. 90).

The Plaintiffs, all black lung claimants, assert that they were required to complete a Department form entitled "Miner's Claim for Benefits Under the Black Lung Benefits Act," which compelled them to place their social security

[1] For a thorough discussion of the factual posture and applicable law in this case refer to the reports and recommendations submitted by United States Magistrate Judge Pamela Meade Sargent dated October 29, 1999 and May 24, 2000.

numbers on the form. It appears from the record, that the Office of Workers' Compensation Program of the Department of Labor, utilizes the social security numbers for identification purposes. The Plaintiffs also allege that the Department disseminated their social security numbers via multi-captioned hearing notices which typically listed twenty black lung claimants per notice, and were distributed to other claimants, coal companies, insurance companies and other attorneys. Additionally, the Plaintiffs assert that the Department also uses the claimants' social security numbers on black lung decisions that are subsequently reported in various services.

The Department does not dispute the use of the social security numbers, but contends that the use of such numbers does not violate the Privacy Act. However, the Department has agreed to stop using the claimants' social security numbers on multi-captioned black lung hearing notices and to stop mailing these notices with the social security numbers.

The crux of the issue at hand is whether the Plaintiffs provided evidence of damages caused by the alleged injurious acts committed by the Department, namely disseminating social security numbers to parties unrelated to a particular black lung case. The record indicates that the original and amended complaints were not sworn by the Plaintiffs, and failed to indicate what damages the Plaintiffs actually suffered. In particular, the Amended Complaint does not allege any out-of-pocket expenses or emotional distress due to the publication of the Plaintiffs' social security numbers.

Although the Plaintiffs Robert Doe, Buck Doe, R.A. Doe, and Dallas Doe testified at a hearing on May 6, 1998, regarding the Department's use of their social security

numbers, they failed to mention or claim any financial loss or out-of-pocket expense related to such use of their social security numbers. Robert Doe did testify that he was "concerned" about the Department's public use of his social security number (Docket Item No. 64, p. 30, lines 1-8), but that "nothing bad happened to me but I guessed it could." (Docket Item No. 64, p. 25, lines 11-14.) R.A. Doe initially testified that the dissemination of his social security number concerned him, but on cross-examination stated that it really did not bother him. (Docket Item No. 75, p. 75, lines 8.) Conversely, Dallas Doe testified that because of the dissemination of his social security number he was forced to seek medical treatment, however, he failed to present any evidence supporting his alleged medical or psychological condition or the cause thereof. Buck Doe was the sole plaintiff to file an affidavit with the court stating that he suffered emotional distress from the Department's public disclosures of his social security number. (Affidavit of Buck Doe, Docket Item No. 14.) Thus, Buck Doe was only plaintiff to provide evidence of damages and causation sufficient enough to create a genuine issue of material fact.

The Department moved for summary judgment on November 24, 1997 in part because the plaintiffs failed to produce any evidence that they suffered actual damages. Absent from the Plaintiffs' response was any mention of or request for additional discovery or proof of damages. The plaintiffs also failed to present this issue before the Magistrate Judge in a hearing held on April 22, 1999. As a result, the Magistrate Judge issued the October 29, 1999 report recommending that the Defendant's Motion for Summary Judgment be granted against all plaintiffs, except Buck Doe, on the basis that they failed to produce any evidence showing actual damages. Subsequent to the October 29, 1999 report, the Plaintiffs filed a Motion to

Amend Complaint and File Affidavits in Support of Damages, which is addressed by the May 24, 2000 report and recommendation.

SUMMARY JUDGMENT STANDARD

This court will grant summary judgment only when "the pleading, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A court must view all evidence and factual inferences in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). However, even "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Id.* at 247-248.

FINAL DETERMINATION

The first issue before this court concerns the lingering question of whether this case should be certified as a class action. The court adopts the finding in the October 29, 1999 report and recommendation that a class action certification is not appropriate in this case, because the Plaintiffs' individual claims are not typical of all class members as is required by Federal Rule of Civil Procedure 23(a). Therefore, the Plaintiffs' Motion to Certify Class Action is hereby DENIED.

The second and more recent issue to arise in this case involves the Plaintiffs' Motion to Amend Complaint and File Affidavits in Support of Damages. As both parties are fully aware, this case has been in existence for a number of years and has involved a host of extensive hearings and a

multitude of motions. It was only after the Magistrate Judge recommended granting the Department's Motion for Summary Judgment did the Plaintiffs suddenly want to amend their Complaint and provide evidence of damages. Unfortunately the ship has already sailed for the plaintiffs; it is now too late for the Plaintiffs to amend their complaint and to provide evidence of alleged damages. The plaintiffs were on notice and had ample opportunity to remedy their damages dilemma as it pertained to the Defendant's Motion for Summary Judgment, but they failed to do so. It is accordingly ADJUDGED and ORDERED that the Plaintiffs' Motion to Amend Complaint and File Affidavits in Support of Damages is hereby DENIED.

Thirdly, as per the October 29, 1999 report and recommendation, this court finds that the plaintiff Buck Doe has proven the four elements essential to prevail on a claim for damages under the Privacy Act.[2] Furthermore, this court finds sufficient incontrovertible evidence supporting Buck Doe's assertion that he suffered "actual damages," in the form of emotional distress as a result of the Department disclosing his social security number to parties not specifically involved in his black lung claim. Accordingly, the October 29, 1999 report and recommendation is sustained in part, as it relates to Buck Doe proving the four

[2] In order for a claimant to succeed in a Privacy Act claim he or she must prove the following four elements: (1) the information at issue is covered by the Privacy Act as a "record" contained in a "system of records;" (2) the agency "disclosed" the information; (3) the disclosure had an "adverse effect" on the Plaintiffs; and (4) the disclosure was willful and intentional. *See Quinn v. Stone*, 978 F.2d 126, 131 (3d Cir. 1992); *see also Rose v. United States*, 905 F.2d 1257, 1259 (9th Cir. 1990). Pursuant to 5 U.S.C. § 552a(g)(4)(A) (1994), a claimant who proves the aforementioned elements may recover an amount equal to "actual damages."

essential elements to a Privacy Act case, and reversed in part, in that Buck Doe provided sufficient evidence of actual damages that not only allowed him to survive the Department's summary judgment motion, but also allows granting summary judgment in his favor. Thus, Buck Doe's Motion for Summary Judgment is hereby GRANTED.

Finally, this court adopts the remaining findings, recommendations, and conclusions found in the report and recommendations dated October 29, 1999 and May 24, 2000.

It is hereby ADJUDGED and ORDERED that (1) the claimant, Buck Doe, be awarded the statutory minimum amount of $1,000 dollars, provided by 5 U.S.C. § 552a(g)(4)(A) (1994); and (2) as a result of the Plaintiffs receiving preliminary injunctive relief,[3] the court awards attorney's fees. The Plaintiffs' Counsel must submit a petition for attorney's fees with this court within twenty (20) days of receipt of this Order.

Pursuant to the above-mentioned judgments by the court, this case shall be stricken from the docket.

[3] The preliminary injunction required the Department to cease using the claimants' social security numbers on multi-captioned black lung hearing notices, to discontinue the practice of mailing multi-captioned black lung hearing notices which disclose the claimants' social security numbers, and to generally obey the provisions of the Privacy Act.

The Clerk is directed to send certified copies of this Order to all counsel of record.

ENTER: This 24th day of July, 2000

/s/
SENIOR UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF VIRGINIA,
BIG STONE GAP DIVISION.

Robert DOE, a/k/a Virginia Privacy Litigation, et al.,
Plaintiffs
v.
Alexis M. HERMAN,
Secretary of the Department of Labor[1],
Defendant

No. CIV. A. 297CV00043.

Oct. 29, 1999.

Report and Recommendation By: Pamela Meade Sargent United States Magistrate Judge.

SARGENT, Magistrate J.

I. Introduction

Plaintiff, Robert Doe, a pseudonym, and others, ("the Plaintiffs"), have filed these consolidated actions against the Secretary of the United States Department of Labor, ("the Department"). Plaintiffs allege that the Department has committed numerous violations of the Privacy Act, 5 U.S.C.A. § 552a (West 1996 & Supp. 1999), in its administration of the Federal Black Lung Benefits Act of 1981, 30 U.S.C.A. § 901 *et seq.* (West 1986 & Supp. 1999). Currently pending before the court are Plaintiffs' Motion To Certify Class Action, (Docket Item No. 23), and cross motions for summary judgment filed by the Plaintiffs and

[1] Alexis M. Herman became Secretary of the Department of Labor on May 9, 1997. Pursuant to FED. R. CIV. P. 25(d)(1), Alexis M. Herman is substituted for Acting Secretary, Cynthia A. Metzler, as the defendant in this suit.

the Department, (Docket Item Nos. 11 and 21). The jurisdiction of this court is based on 5 U.S.C.A. § 552a(g)(1) and 28 U.S.C.A. § 1331. These motions are before the undersigned magistrate judge by referral pursuant to 28 U.S.C.A. § 636(b)(1)(B).

II. Factual Background

The facts underlying this litigation are largely uncontested. Plaintiffs, all claimants for federal black lung benefits, initiated this litigation by filing seven separate complaints, seeking damages and temporary and permanent injunctions, on or about February 13, 1997.[2] In these complaints, the Plaintiffs allege that part of the appeals process for receipt of federal black lung benefits requires the completion of a Department of Labor form entitled "Miner's Claim For Benefits Under The Black Lung Benefits Act," ("the Claim Form"). (Exhibit 1, Defendant's Cross Motion for Summary Judgment, Docket Item No. 21.) Question No. 2 of the four-page Claim Form requests the miner's social security number. The Office of Workers' Compensation Program of the Department of Labor, which

[2] These seven actions were consolidated by order entered June 4, 1997, (Docket Item No. 8). By order entered August 4, 1997, (Docket Item No. 13), the court allowed an eighth named plaintiff to intervene in these cases. The eight named plaintiffs are referred to by the following pseudonyms: Robert Doe, (2:97CV00043); Tays Doe, (2:97CV00043); Charles Doe, (2:97CV00053); Joe Doe, (2:97CV00054); Thomas Doe, (2:97CV00055); Buck Doe, (2:97CV00056); Dick Doe, (2:97CV00057); and Otis Doe, (2:97CV00058). There are currently pending before the court three other motions to intervene which were filed on behalf of another 16 black lung claimants. (Docket Item Nos. 17, 20 and 81.) The pseudonyms being used by the court to refer to these individuals are Leon Doe, W.S. Doe, Cleveland Doe, Clint Doe, Alex Doe, Will Doe, Lula Doe, Isaac Doe, Rafe Doe, Jessie Doe, Harvie Doe, Ross Doe, S.R. Doe, F. Doe, R.A. Doe and Dallas Doe. The court has not ruled on these motions to intervene.

administers the federal black lung benefits program, utilizes this social security number for identification purposes. In particular, the Department uses these social security numbers as "OWCP" numbers to identify each claim. (Declaration of Miriam Miller, Exhibit 2, Defendant's Cross Motion for Summary Judgment, Docket Item No. 21; Stipulation, Docket Item No. 6.)

The Plaintiffs also allege that the Department distributed these social security numbers on a widespread basis to many uninterested parties. Plaintiffs object specifically to the Department's use of multi-captioned hearing notices. These notices contained the names and social security numbers of approximately 20 black lung claimants whose hearings would occur before an administrative law judge on a particular date.[3] The notices are then distributed to each of the claimants listed on the notice, and their attorneys, as well as all of the coal companies and insurance companies that are involved in each of the cases listed on the notice. Thus, many parties who have no stake in a particular claim are apprized of a claimant's social security number.

The Plaintiffs also maintain that, as a result of the Department's indiscriminate use of social security numbers, some of the black lung decisions reported by various services include claimants' social security numbers. These reports are available in public libraries and on various online legal research services. In addition, decisions containing claimants' social security numbers also are

[3] Examples of these notices can be found in the record. (Exhibits A, B1, B2, B3, B4, B5, B6, B7, B8, Motion To Hold Defendant In Contempt Of Court For Violating The Court Order Of February 20, 1997, In Which Defendant Agreed To Abide By The Privacy Act, And For Other Violations Of The Said Order, Docket Item No. 31.)

published in a series of books known as the Benefits Review Board Reporter.[4]

The Department does not dispute that it used the Plaintiffs' social security numbers as alleged, however, the Department asserts that these uses did not violate the Privacy Act. (Exhibit 2, Docket Item No. 21.)

Plaintiffs claim that their names, addresses and social security numbers constitute private information and that disclosure of this information violates 5 U.S.C.A. § 552a, as well as the due process of law and their rights of privacy under the United States Constitution. The Plaintiffs allege that the distribution of this information to complete strangers has had adverse effects on them. They assert that the Department's conduct raises a serious and grave threat to privacy, security, credit ratings, identity and well-being. The Plaintiffs contend that these rights are protected by the Privacy Act, as well as the Constitution of the United States. Plaintiffs seek monetary damages for each violation and temporary and permanent injunctive relief ordering the Department to cease the disclosure and mass publication of the social security numbers of black lung claimants.

After the filing of these actions, the parties entered into a stipulation whereby the Department agreed to stop using the claimants' social security numbers on multi-captioned black lung hearing notices and to discontinue the practice of mailing multi-captioned black lung hearing notices which bear claimants' social security numbers. (Docket Item No. 6, ¶ 1.) The Department further agreed that its employees would obey the provisions of the Privacy Act. The Department stated, in this stipulation, that the agreement

[4] Examples of these published opinions can be found in the record. (Exhibits C1, C2, C3, C4, C5 and C6, Docket Item No. 31.)

was not an admission that it had violated the Privacy Act. Rather, the stipulation served to resolve the issues raised in Plaintiffs' February 13, 1997, motion for temporary and permanent injunctive relief. (Motion For Temporary Injunction, Docket Item No. 2.) This court entered the stipulation as an order on February 20.1997. (Docket Item No. 6.)

On August 4, 1997, the court granted Plaintiffs' motion to amend their complaint, (Docket Item No. 15), and the Plaintiffs filed an Amended Complaint on September 10, 1997. (Amended Complaint, Docket Item No. 19.) This Amended Complaint was substantially similar to the seven original complaints in all respects, except that it also contained allegations averring that the court should certify this litigation as a class action. The Amended Complaint alleges that the court should certify a class consisting of all applicants for black lung benefits through the black lung program operated by the Department. (Docket Item No. 19, ¶ II(2).) None of the seven original complaints or the Amended Complaint were sworn to by the Plaintiffs. The Amended Complaint alleges that the Plaintiffs were adversely affected by the Department's disclosure of their social security numbers, but it does not contain any allegations regarding, what, if any, damages the Plaintiffs have suffered as a result of these disclosures. Specifically, the Amended Complaint does not allege that the Plaintiffs have suffered any out-of-pocket expenses or emotional distress as a result of these disclosures.

On July 30, 1997, Plaintiffs filed their motion for summary judgment. (Plaintiffs' Motion For Summary Judgment, Docket Item No. 11.) The Department responded by filing its own cross motion for summary judgment on November 24, 1997. (Docket Item No. 21.) On December 24, 1997, the Plaintiffs moved the court to certify this

litigation as a class action. (Plaintiffs' Motion To Certify Class Action, Docket Item No. 23.) The parties have provided written arguments to the court. Various exhibits, deposition transcripts and affidavits also have been filed for the court's consideration. At least three separate hearings have been held, at which, several witnesses have testified.

Included among the exhibits filed for the court's consideration is a copy of the Claim Form. (Exhibit 1, Docket Item No. 21.) The first page of the Claim Form contains the following statement:

> IMPORTANT: No benefits may be paid under the Black Lung Benefits Act unless a completed application form has been received. (30 U.S.C. 901, *et seq.)* Completion of this form may represent a claim against an individual coal mine operator. If such operator is involved, a copy of this form will be provided to that operator.

(Exhibit 1, Docket Item No. 21.) Page four of the Claim Form contains the following statement:

> PRIVACY ACT STATEMENT
>
> The following information is provided in accordance with the Privacy Act of 1974.(1) Submission of this report is required under the Black Lung Benefits Act. (2) The information in the report will be used to determine eligibility for and the amount of benefits payable under the Act. (3) The information may be used by other agencies or persons in handling matters relating, directly or indirectly, to the subject matter of the claim, so long as such agencies or persons have received the consent of the individual claimant or beneficiary, or have complied with the provisions of 20 C.F.R. Part 725.(4) Furnishing all requested information will facilitate the claims adjudication process; and the effects of not providing all or any part of the requested information may delay the process, or result in an unfavorable decision or a reduced level of benefits. (Disclosure of your social security number is voluntary; the failure to disclose such number will not result in the denial of any right, benefit or privilege to which an individual may be entitled.)

(Exhibit 1, Docket Item No. 21.)

Two of the named Plaintiffs, Robert Doe and Buck Doe, and two of the individuals who have moved to intervene, R.A. Doe and Dallas Doe, testified at the court's May 6, 1998, hearing on this matter. (Transcript of Hearing on Certification as Class Action, Docket Item No. 64.) None of these men provided any testimony that they had suffered any financial loss or out-of-pocket expense as a result of the Department's disclosure of their social security numbers. Robert Doe testified that he "would rather not have anybody or a lot of people having [his][s]ocial [s]ecurity number. Nothing bad happened to me but I guess it could." (Docket Item No. 64, Page 28, lines 11-14.) Robert Doe stated that he was "concerned" that the Department had disclosed his social security number and home address. (Docket Item No. 64, Page 30, lines 1-8.) Robert Doe also testified that after he was awarded black lung benefits several people called him asking to borrow money. He admitted, however, that he had no knowledge of whether these calls were as a result of the Department's disclosure of his name and social security number. (Docket Item No. 64, Page 37, lines 3-10.)

Buck Doe testified that he thought it was "odd" that the Department sent his social security number out on multi-captioned hearing notices. (Docket Item No. 64, Page 45, lines 19-23.) Buck Doe also stated that "it bothered me." (Docket Item No. 64, Page 46, line 12; Page 51, lines 14-18; Page 52, line 9.)

R.A. Doe testified that it concerned him that his social security number was disclosed by the Department. (Docket Item No. 64, Page 75, line 8.) On cross-examination, however, R.A. Doe stated that it didn't really bother him that the Department had listed his social security number on his hearing notice. (Docket Item No. 64, Page 78, lines 9-10.)

Dallas Doe testified that he had worried so much over the Department's use of his social security number that he had sought medical treatment. (Docket Item No. 64, Page 69, line 25; Page 70, lines 1-12.) Dallas Doe did not, however, produce any medical evidence that he suffered from any medical or psychological condition necessitating treatment. Nor did he produce any medical evidence as to the cause of this alleged physical or mental condition.

Plaintiff, Buck Doe, also filed an affidavit for the court's consideration. (Affidavit of Buck Doe, Docket Item No. 14.) In this affidavit, Buck Doe stated that he was "greatly concerned and worried" about his name, social security number and address being disclosed by the Department. Buck Doe also stated, "I believe my privacy has been violated in a way that words cannot describe. . . . It has torn me all to pieces to realize that my social security number has been distributed. . . . I feel that . . . no amount of money could compensate me for worry and fear of not knowing when someone would use my name and social security number. . . ." (Docket Item No. 14.)

None of the other Plaintiffs or individuals who have sought to intervene have provided any evidence to the court, either by testimony or affidavits, with regard to what, if any

effect they claim the Department's disclosure has had on them.[5]

The Plaintiffs have filed the transcripts of the deposition and hearing testimony of several administrative law judges, ("ALJs"), who conducted black lung hearings. These ALJs testified that they had routinely used multi- captioned hearing notices which included the social security numbers of black lung claimants. (Deposition of Edward Terhue Miller, Page 46-7; Deposition of Richard K. Malamphy, Page 20.) None of these ALJs testified that he had been provided any training on the Privacy Act. (Deposition of Miller, Pages 13, 21; Deposition of Malamphy, Page 15.) Associate Chief ALJ Thomas Burke, testified at the court's April 1, 1998, hearing. Judge Burke stated that multi-captioned hearing notices were used to save personnel, administrative and supply resources. (Docket Item No. 67, Page 114.) Also, Chief ALJ of the Department of Labor, John Vittone, testified at this hearing that the black lung program was the Department's only benefits program which used social security numbers as identifiers. (Docket Item No. 67, Page 56.) Also, both Vittone and Burke testified that they had received no training with regard to the Privacy Act. (Docket Item No. 67, Pages 36-37, 148.)

III. Analysis

The first issue which should be addressed by the court is the issue of class certification. Class certification is governed by Rule 23 of the Federal Rules of Civil Procedure. First, a party seeking certification has the burden of showing that he or she meets all four of the prerequisites to a class action, set forth in Rule 23(a):

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[5] Examples of these published opinions can be found in the record. (Exhibits C1, C2, C3, C4, C5 and C6, Docket Item No. 31.)

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable [numerosity], (2) there are questions of law or fact common to the class [commonality], (3) the claims or defenses of the represented parties are typical of the claims or defenses of the class [typicality], and (4) the representative parties will fairly and adequately protect the interest of the class [adequacy].

FED. R. CIV. P. 23(a). *See* 7A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 1759 (2nd Ed. 1986). Second, the party seeking certification must meet at least one of the three possible categories for maintaining a class action described in 23(b). *See* WRIGHT at § 1759. Rule 23(b) states:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudication or substantially impair or impede their ability to protect their interests; or
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby,

> making appropriate final injunctive relief or corresponding to declaratory relief with respect to the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. . . .

FED. R. CIV. P. 23(b). As stated above, the burden to plead and prove each of these requirements in this case rests with the Plaintiffs, who are seeking class certification. *See In re A.H. Robins Co., Inc.,* 880 F.2d 709, 728 (4th Cir. 1989); *see also, In re American Med. Sys., Inc.,* 75 F.3d 1069, 1086 (6th Cir. 1996); *Lyon v. United States,* 94 F.R.D. 69, 73 (W.D.Okla. 1982). Also, a district court has wide discretion in deciding whether or not to certify a proposed class. *See Robins,* 880 F.2d at 728-29; *Sterling v. Velsicol Chem. Corp.,* 855 F.2d 1188, 1197 (6th Cir. 988).

Based on my application of these requirements to the facts of this case, and based, in part, on my recommendation with regard to the parties' cross motions for summary judgment contained below, I recommend that the court deny the Plaintiffs' motion to certify this case as a class action. Based on the allegations of the Plaintiffs,[6] I find that there is little question that the facts of this case would satisfy the requirements of numerosity, commonality and adequacy. I, however, cannot find that the claims of the Plaintiffs are typical of the claims of the class. Based on this finding, I do

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[6] The substantive allegations of the Plaintiffs are accepted as true for the purpose of determining whether a case should be certified as a class action. *See Jackson v. Rapps,* 132 F.R.D. 226, 230 (W.D.Mo. 1990).

not address whether the facts of this case satisfy any of the three requirements contained in Rule 23(b).

In *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 343 (4th Cir. 1998), the Fourth Circuit found that the individualized nature of the damages claimed in an action could destroy the typicality needed to pursue a class action. In Privacy Act cases such as this one, certain specific determinations must be made on an individual basis. *See Lyon,* 94 F.R.D. at 76. In particular, as set forth in greater detail below, each plaintiff must plead and prove his "actual damages sustained." 5 U.S.C.A. § 522a(g)(4)(A) (West 1996). Here, the Plaintiffs are alleging only emotional injuries,[7] and the courts have been hesitant to find emotional injuries typical. *See Sanna v. Delta Airlines,* 132 F.R.D. 47, 50 (N.D.Ohio 1990) (plaintiffs alleged injuries from in-flight technical problems on an international flight); *Ikonen v. Hartz Mountain Corp.,* 122 F.R.D. 258, 262-63 (S.D.Cal. 1988) (pet owner sued over allegedly poisonous flea and tick spray); *Alvarado Morales v. Digital Equip. Corp.,* 669 F. Supp. 1173, 1185 (D.Puerto Rico 1987) (employees sued over workplace conditions); *In re Three Mile Island Litig.,* 87 F.R.D. 433, 441-42 (M.D.Pa. 1980) (denying class certification for claims alleging emotional distress from nuclear accident because each claim required "individual proof"). *But see Sterling,* 855 F.2d at 1197 (although unique and particular proof was needed from each plaintiff on the issue of damages, class certification was appropriate on issue of liability); *Medicare Beneficiaries'*

[7] As stated above, none of the Plaintiffs' complaints nor the Amended Complaint specifically allege that the Plaintiffs suffered any damages, emotional or otherwise, as a result of the Department's actions. Nonetheless, the Plaintiffs assert in their written legal arguments that they are alleging emotional injuries only. *(See, e.g.,* Docket Item No. 11 at 3.)

Defense Fund v. Empire Blue Cross Blue Shield. 938 F. Supp. 1131, 1147 (E.D.N.Y. 1996) ("individual questions with respect to damages will not defeat class certification or render a proposed representative inadequate unless that issue creates a conflict which goes to the heart of the lawsuit," even when the plaintiffs seek damages for emotional distress). The individualized nature of the proof required to prove the Plaintiffs' alleged emotional injuries precludes this court from finding that the Plaintiffs' claims are typical of those of the class. *See Lyon,* 94 F.R.D. at 76; *see also Windham v. American Brands, Inc.,* 565 F.2d 59, 72 (4th Cir. 1977) (en banc) (in antitrust case, class action should not have been certified where there exists no easy formula for computing damages without individual determination); *Ryan v. Eli Lilly and Co.,* 84 F.R.D. 230 (D.S.C. 1979). Therefore, I recommend that the court deny Plaintiffs' Motion To Certify Class Action. (Docket Item 23.)

Next, the court must address the parties' cross motions for summary judgment. Summary judgment is appropriate in a case "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); *see also Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986). In considering a motion for summary judgment, the function of the district court is not to weigh the evidence, but to determine whether a genuine issue of fact exists for trial. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986). The party seeking summary judgment has the responsibility to inform the court of the basis for its motion and to identify the parts of the record which it believes demonstrate the absence of genuine issues of material fact.

See Celotex Corp., 477 U.S. at 323. In contrast, the non-moving party "need only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial." *Anderson,* 477 U.S. at 257. "The evidence of the non- movant is to be believed, and all justifiable inferences are to be drawn in [its] favor." *Anderson,* 477 U.S. at 255. Thus, summary judgment should be granted only if, upon consideration of the record as a whole, a reasonable trier of fact could not find for the non-movant. *See Allstate Fin. Corp. v. Financorp, Inc.*, 934 F.2d 55, 58 (4th Cir.1991). Once the moving party has met its burden to show an absence of material fact, the opposing party must come forward with affidavits or other evidence demonstrating that there is a genuine issue for trial. *See Celotex Corp.*, 477 U.S. at 323-25; *Anderson,* 477 U.S. at 248-49. The party opposing summary judgment cannot rest on unverified pleadings and allegations, but, instead must present some type of evidentiary material in support of its position. *See Celotex Corp.*, 477 U.S. at 324. When ruling on cross motions for summary judgment, the court must consider the motions independently and view evidence in each motion in the light most favorable to the party opposing the motion.

In these cases, the parties have filed cross motions for summary judgment. As stated above, there is little, if any, dispute in the facts at issue in this case. The issues to be determined, therefore, are whether the undisputed facts prove that the Department violated the Privacy Act and whether the Plaintiffs are entitled to damages.

The Plaintiffs claim that they are entitled to summary judgment because the undisputed facts show that the Department violated the Privacy Act by disclosing their social security numbers, without their permission on numerous occasions. The Plaintiffs claim that these

disclosures had an adverse effect on each of them entitling each Plaintiff to the statutory minimum damages of $1,000 for each violation.

The Department, on the other hand, claims that the undisputed facts show that it is entitled to summary judgment as a matter of law. In particular, the Department argues that its use of the Plaintiffs' social security numbers did not violate the Privacy Act because the Plaintiffs consented to the disclosure knowing that black lung proceedings are public proceedings and that the use was disclosed by the Department as a "routine use." The Department also argues that summary judgment should be granted in its favor because the Plaintiffs have failed to produce any evidence that they have suffered any adverse effect or actual damages as a result of the use of their social security numbers. The Department also argues that the Plaintiffs are not entitled to damages under the Privacy Act because they cannot show that the Department's actions were intentional and willful.

The right of privacy is one of the most closely guarded treasures of our society. It is characterized as an individual's interest in avoiding disclosure of personal matters. "In response to growing concerns over the accumulation of massive amounts of personal information, Congress passed the Privacy Act of 1974." *Greidenger v. Davis,* 988 F.2d 1344, 1353 (4th Cir. 1993). The Privacy Act of 1974 was designed to safeguard the right of personal privacy against invasion by government agencies which collect and use personal data. It was intended to "provide protection against possible abuses of governmental power to affect an individual's privacy and confidential information. . . .' *Williams v. Department of Veterans Affairs,* 104 F.3d 670, 676 (4th Cir. 1997). Congress sought "to promote governmental respect for the privacy of citizens

by requiring all departments and agencies of the executive branch and their employees, to observe certain constitutional rules in computerization, collection, management, use, and disclosure of personal information about individuals." S. Rep. No. 93-1183 (1974) *reprinted in* 1974 U.S.C.C.A.N. 6916, 6916 (Senate Report accompanying S. 3418, The Privacy Act of 1974).

To address these concerns, Congress, through passage of the Privacy Act, made it unlawful for any agency to disclose any record contained in its system of records to any person or other agency, except pursuant to written request by, or with the prior written consent of, the individual to whom the record pertains. *See* 5 U.S.C.A. § 552a(b) (West 1996 & Supp. 1999). This section lists a number of exceptions to this rule, none of which the Department argues is applicable here, except for the "routine use" exception. *See* 5 U.S.C.A. § 552a(b)(3). The Privacy Act defines "routine use" of a record as "the use of such record for a purpose which is compatible with the purpose for which it was collected." 5 U.S.C.A. § 552a(a)(7) (West 1996).

The Privacy Act also requires that an agency collecting information from an individual must inform the individual of the authority which authorizes it to solicit the information, whether disclosure of the information is mandatory or voluntary, the principal purposes for which the information is intended to be used, the routine uses to be made of the information and the effects on the individual, if any, of not providing the requested information. *See* 5 U.S.C.A. § 552a(e)(3)(A)-(D) (West 1996). The Privacy Act also requires each agency to keep an accurate accounting of the date, nature, purpose and the name and address of the person or agency to whom any disclosure is made, including disclosure for routine uses. *See* 5 U.S.C.A. § 552a(e)(1) (West 1996).

Congress also specifically recognized the dangers of widespread dissemination of social security numbers when it enacted the Privacy Act. A primary impetus for the legislation was to "curtail the expanding use of social security numbers by federal and local agencies and, by so doing, to eliminate the threat to individual privacy and confidentiality of information posed by common numerical identifiers." *Doyle v. Wilson*, 529 F. Supp. 1343, 1348 (D.Del. 1982) (citing S. Rep. No. 93-1183 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6916, 6944.) Consequently, the Privacy Act specifically addresses the use and disclosure of social security numbers. The Privacy Act established that it is unlawful for any federal, state or local government agency to deny any individual any right, benefit or privilege provided by law because the individual refused to disclose his or her social security number. *See* Pub. L. No. 93-579, § 7(a)(1), 88 Stat. 1895, 1909 (codified at 5 U.S.C.A. § 552a Historical And Statutory Notes (West 1996)).[8] The Privacy Act also requires that any government agency which requests an individual to disclose his social security number must state whether the disclosure is mandatory or voluntary, by what statutory authority the number is being solicited, and what uses will be made of the number. *See* Pub. L. No. 93-579, § 7(a)(1), 88 Stat. 1895, 1909 (codified at 5 U.S.C.A. § 552a Historical And Statutory Notes (West 1996)). Since the enactment of the Privacy Act, the concerns over social security numbers as widespread identifiers has increased exponentially. *See Greindiger*, 988 F.2d at 1353. In fact, the court in *Greindiger* cited numerous examples of the devastating impact that the disclosure of one's social security number can bring. *See Greindiger*, 988 F.2d at 1353-54 (citing newspaper articles).

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[8] The Privacy Act contains several provisions that were not codified but may be found as Historical And Statutory Notes to 5 U.S .C. § 552a.

Nonetheless, to prevail on their claims for damages under the Privacy Act, Plaintiffs must establish the following four elements: (1) the information at issue is covered by the Privacy Act as a "record" contained in a "system of records;" (2) the agency "disclosed" the information; (3) the disclosure had an "adverse effect" on the Plaintiffs (an element which separates itself into two components: (a) an adverse effect standing requirement and (b) a causal nexus between the disclosure and the adverse effect); and (4) the disclosure was willful and intentional. *See Quinn v. Stone,* 978 F.2d 126, 131 (3d Cir. 1992); *see also Rose v. United States,* 905 F.2d 1257, 1259 (9th Cir. 1990). The Privacy Act states that an individual who proves the above elements may recover an amount equal to the sum of "actual damages sustained . . . but in no case shall a person entitled to recovery receive less than the sum of $1,000. . . ." 5 U.S.C.A. § 552a(g)(4)(A) (West 1996).

In this litigation, no dispute exists as to whether the social security numbers at issue constitute records as defined by the Privacy Act. A "record" may be "any item, collection, or grouping of information about an individual. . . ." 5 U.S.C.A. § 552a(a)(4) (West 1996). In fact, the Fourth Circuit has held that a "record" under the Act includes as little as one descriptive item about an individual. *See Williams,* 104 F.3d at 674. Thus, I recommend that the court find that the social security numbers at issue constitute records as defined by the Privacy Act.

Also, Plaintiffs point to the undisputed widespread mailing of the multicaptioned hearing notices to support their position that the Department "disclosed" their social security numbers. In opposition, the Department presents two arguments. First, the Department maintains that any social security numbers used were voluntarily provided to

the Department and that the claimants were on constructive notice that the black lung determination proceedings are public proceedings. *See* 30 U.S.C.A. § 932(a) (West 1986) (incorporating 33 U.S.C.A. § 923(b) (West 1986)). Thus, the Department argues the Plaintiffs have no right to now complain that their social security numbers have been disclosed. While I agree with the Department, that any claimant who supplied a social security number did so voluntarily, I do not find that by providing their social security numbers the Plaintiffs were on notice of, or consented to, their use on multi-captioned hearing notices or in published black lung opinions.

The Department correctly notes that the Claim Form on which the Plaintiffs provided their social security numbers clearly indicated that disclosure of the numbers was voluntary and informed the Plaintiffs that the failure to disclose their social security numbers would not result in the denial of any right, benefit or privilege to which a claimant may be entitled. (Exhibit 1 at 4, Docket Item No. 21.) The Claim Form does not, however, contain any notification that a claimant's social security number would be used on multi-captioned hearing notices or published in compilations of black lung opinions.

Plaintiffs here provided their social security numbers for the limited purpose described on the Claim Form—to determine eligibility for and the amount of benefits payable. They did not provide a general authorization to disclose any personal information listed on the form to a variety of sources unconnected to their claims or to the public at large. *See, e.g., Thomas v. Veterans Admin.,* 467 F. Supp. 458, 460 n.4 (D.Conn. 1979) (quoting an example of an arrest record waiver). Moreover, the Privacy Act clearly indicates that when an agency solicits a social security number it shall inform the individual of what use will be made of it. *See* 5

U.S.C.A. § 552a(e)(3)(B)-(C) (West 1996); *Doe v. Sharp,* 491 F. Supp. 346, 350 (D.Mass. 1980) (citing to S. Rep. No. 93-1183 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6916). Furthermore, prior to 1999, the Department's own regulations required it to notify an individual of the uses that may be made of a social security number. *See* 29 C.F.R. § 70a.10(c)(1) (1998). The Department did not inform the Plaintiffs in these cases that their social security numbers would be used as identifiers and disseminated to numerous other individuals and companies on multi-captioned hearing notices. Nor did the Department inform the Plaintiffs that their social security numbers would be published in compilations of black lung opinions. I conclude that the manner in which the social security numbers were used in these cases is far afield from simply using them to determine eligibility for benefits. *See generally Doe v. General Services Admin.,* 544 F. Supp. 530 (D.Md. 1982) (release of military psychiatric records). Therefore, I reject any argument by the Department that the Plaintiffs voluntarily consented to use of their social security numbers for these purposes.

I also reject the Department's argument that the practice of disseminating social security numbers on multi-captioned hearing notices was permissible because black lung proceedings are public proceedings. "While the [Privacy] Act does not specifically define 'disclosure,' common sense requires that this term be taken to denote the imparting of information which in itself has meaning and which was previously unknown to the person to whom it was imparted." *Sullivan v. United States Postal Serv.,* 944 F. Supp. 191, 196 (W.D.N.Y. 1996) (quoting *Harper v. United States,* 423 F. Supp. 192, 197 (D.S.C. 1976)). The Department cites *Ash v. United States,* 608 F.2d 127 (5th Cir. 1979), to support its argument. In that case, the

plaintiff was punished by the Navy for drug use in a non-judicial proceeding. He contended that his privacy was infringed when his name, offense and punishment were published in the daily bulletin of his command. The court concluded that since the proceedings themselves were open to the personnel of the command, publication of the results to that same command was not a disclosure under the Privacy Act.

If the issue before this court were whether publishing the results of a claimant's application for black lung benefits was a disclosure under the Privacy Act, I might view *Ash* as instructive. However, the issue in dispute here is much more specific. The Plaintiffs are not alleging that the Department violated the Act by releasing the determination made on their claims or information used to determine their claims. The Plaintiffs allege that the Department has violated the Privacy Act by using their social security numbers as OWCP file numbers and then disclosing their social security numbers to others without their permission. The use and dissemination of a claimant's social security number has no relation to the public proceedings of determining black lung eligibility. The logic employed by the Fifth Circuit in *Ash* supports this conclusion. Before determining that no disclosure had occurred, the court detailed the history of the military proceedings that were open to the command. *See Ash,* 608 F.2d at 179. The court noted that historically these summary proceedings have been open to the command. *See* 608 F.2d at 179. In fact, they were traditionally held near the ship's mainmast before the entire crew before general announcements and awards were given. The disclosure of social security numbers knows no such openness. The Department has produced no evidence that disseminating social security numbers has anything at all to do with the openness of black lung

proceedings. In fact, the only true reason given for the use of claimants' social security numbers as file identifiers was for the convenience of the Department. (Docket Item No. 21 at 3, 5 and Exhibit 2.) To the contrary, as Congress clearly articulated in passing the Privacy Act, preventing the widespread disclosure of social security numbers was a primary goal of the Act.

Based on arguments by the Department's counsel at various hearings, it also appears that the Department argues that it should not be held liable for disclosing information which already may be public knowledge. (Docket Item No. 64, Pages 31-35, 48-51, 66-68, 78-80, 87-89.) Courts have interpreted the argument that information is not disclosed if it is already public in different ways, however, none of these various approaches, aids the Department's position. The Third Circuit in *Quinn* considered a contention that when information is readily accessible to members of the public (such as through a telephone book) that no disclosure has occurred. While such an argument would be misplaced here due to the confidential nature of social security numbers, I agree that such an approach would "eviscerate the Act's central prohibition [against] disclosure." *Quinn,* 978 F.2d at 134. Similarly, the Fifth Circuit has considered the argument that there is no disclosure within the terms of the Privacy Act where each individual member of the public should be presumed to know the information at issue. *See Federal Deposit Ins. Corp. v. Dye,* 642 F.2d 833, 836 (5th Cir. 1981) (advertisement of foreclosure sales). That approach provides no support to the Department's argument here since the general public is in no way expected to know the social security numbers of its fellow citizens. Thus, I reject the Department's argument that no disclosure occurred here because black lung hearings are public proceedings and because the Plaintiffs may have voluntarily

disclosed their social security numbers to others on other occasions.

I also reject the Department's argument that the use of Plaintiffs' social security numbers on multi-captioned hearing notices was a "routine use" permitted by the Privacy Act. As the Tenth Circuit recognized in *Parks v. IRS,* the Act establishes notice-and-comment rulemaking procedures for determining what constitutes a "routine use" of information from an agency's record system. 618 F.2d 677, 681 (10th Cir. 1980); *See* 5 U.S.C.A. § 522a(e)(4) (West 1996). In order for a use of agency information to qualify as a routine use exemption, each agency must publish annually in the Federal Register a notice including each routine use of the records contained in its system of records along with the categories of users and the purpose of such use. *See* 5 U.S.C.A. § 552a(e)(4) (West 1996); *Parks,* 618 F.2d at 681-82; *Local 2047 v. Defense Gen. Supply Ctr.,* 423 F. Supp. 481, 484 (E.D.Va. 1976) (government not required to give labor union access to private information when the material does not fall under the "routine use" exception to the privacy act).

The Department argues that the disclosure of Plaintiffs' social security numbers are exempt because the disclosure qualifies as a routine use pursuant to its notice published in the Federal Register in September 1993. *See* Privacy Act of 1924; Publication in Full of All Notices of Systems of Records Including Numerous New Systems; Publication of proposed Positive Uses, 58 Fed. Reg. 49,548 (1993) (noticed September 23, 1993). According to this notice, all information provided by black lung claimants, including social security numbers, was to be maintained in a separate system of records known as the Office of Workers' Compensation, Black Lung Benefits Claim File. *See* 58 Fed. Reg. at 49,597. The notice also lists 11 routine uses of

this information. *See* 58 Fed. Reg. at 49,597-98. Despite the Department's assertions to the contrary, this list does not contain any mention of the disclosure of claimants' social security numbers to uninterested parties on multi-captioned hearing notices or to the public at large in compilations of black lung opinions. *See* 58 Fed. Reg. at 49,597-98. Thus, I recommend that the court find that the Department has disclosed the Plaintiffs' social security numbers and that these disclosures were not exempt under the Act.

The Department also argues that summary judgment should be granted in its favor because the Plaintiffs have produced no evidence that the disclosure of their social security numbers has had any adverse effect on them. *See* 5 U.S.C.A. § 552a(g)(1)(D) (West 1996); *Parks,* 618 F.2d at 682. The Privacy Act's civil remedies section provides as follows:

> Civil Remedies.—Whenever any agency . . .
>
> (D) fails to comply with any provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,
>
> the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters....

5 U.S.C.A. § 552a(g)(1)(D) (West 1996). This section gives an individual adversely affected by any agency violation of the Privacy Act a judicial remedy whereby the individual may seek damages. Two limitations are placed on this right to sue. First, the adverse effect requirement is essentially a standing requirement—only those individuals who have been adversely affected may bring suit under the Act. Second, plaintiffs also must allege a causal connection between the agency violation and the adverse effect. *See*

Hewitt v. Grabicki, 794 F.2d 1373, 1379 (9th Cir. 1986) (applicability of Privacy Act cause of action to contents of employees' proficiency reports); *Albright v. United States,* 732 F.2d 181, 186 (D.C.Cir. 1984) (applicability of Privacy Act cause of action to action against Social Security Administration for videotaping a private meeting).

The Plaintiffs argue that they have met the adverse effect requirement by alleging in their complaints that the disclosure of their social security numbers caused them embarrassment and emotional trauma. The Department, on the other hand, argues that the Plaintiffs must show more than emotional injury to show an adverse effect. Based on my review of the cases, I believe that evidence that the disclosure had caused emotional distress would be sufficient to meet this requirement and confer standing. *See Parks,* 618 F.2d at 683; *Albright,* 732 F.2d at 186. As stated above, however, none of the complaints or the Amended Complaint, make any allegations that the Plaintiffs suffered any embarrassment or emotional distress as a result of the disclosure. The complaints and the Amended Complaint allege only that the Plaintiffs have suffered an "adverse effect" as a result of the disclosure, with no allegation made and no subsequent evidence provided as to what type of adverse effect each claims to have suffered.

Nonetheless, I believe the undisputed facts show that the Plaintiffs have suffered an adverse effect in that their social security numbers have been widely distributed without their consent. As stated above, the adverse effect requirement is essentially a standing requirement. *Parks,* 618 F.2d at 682-83. Although the Privacy Act is silent on what constitutes an adverse effect, the phrase "adverse effect" derives from the remedial section of the House bill, H.R. 16373, 93d Cong. (1974), which states that:

> [A]n action will lie for the failure of the agency to comply with any other section of this law when such non-compliance has an adverse effect upon the aggrieved individual.

Parks, 618 F.2d at 682 (citing H. Rep. No. 93-1416, at 17 (1974)). Based on this, it is clear that Congress intended that only an individual whose privacy had been violated should be able to pursue a claim for damages. I do not believe, however, that the adverse effect that a plaintiff must show to have standing is equivalent to the proof of "actual damages" required to recover under 5 U.S.C.A. § 552a(g)(4)(A). *See Quinn,* 978 F.2d at 135 n.15 (citing *Dickson v. Office of Personnel Management,* 828 F.2d 32, 37 (D.C.Cir. 1987) (interpreting a similar term "a determination is made which is adverse to the individual" in 5 U.S.C. § 552a(g)(1)(C))). Here, the Plaintiffs' personal, private information was illegally disclosed. In my opinion, this, in and of itself, is sufficient to meet the adverse effect requirement. *See Parks,* 618 F.2d at 683. Therefore, I recommend that the court find that the Plaintiffs have suffered an adverse effect by the Department's disclosure of their social security numbers.

To prevail in an action brought pursuant to the Privacy Act, a plaintiff also must prove that "the agency acted in a manner which was intentional or willful." 5 U.S.C.A. § 552a(g)(4) (West 1996). "The legislative history describes this standard as (somewhat greater than gross negligence)." *Dowd v. Internal Revenue Serv.,* 776 F.2d 1083, 1084 (2d Cir. 1985); *see also Romero-Vargas v. Shalala,* 907 F. Supp. 1128, 1133 (N.D.Ohio 1995) (both quoting 120 Cong. Rec. 40,405 (1974)(Analysis of House and Senate Comprise Amendments to the Federal Privacy Act)). However, the legislative history also indicates that a plaintiff is not required to prove the agency acted willfully,

arbitrarily or capriciously, as such a standard of proof is too harsh. *See Parks,* 618 F.2d at 683 (also citing 120 Cong. Rec. 40,405 (1974)). Along the same lines, premeditated malice also is not required. *See Parks,* 618 F.2d at 683; *Andrews v. Veterans Admin.,* 838 F.2d 418, 424 (10th Cir. 1988) (personnel records); *Doe,* 544 F. Supp. at 541.

Precisely defining "intentional and willful" under the Privacy Act has been an issue of constant dispute among the circuits. Many courts, including the Fourth Circuit, have concluded that something more than gross negligence is required. *See Scrimgeour v. IRS,* 149 F.3d 318, 326 (4th Cir. 1998); *Tijerna v. Walters,* 821 F.2d 789, 799 (D.C.Cir. 1987); *Moskiewicz v. Dept. Of Agriculture,* 791 F.2d 561, 564 (7th Cir. 1986); *Dowd,* 776 F.2d at 1084. According to this approach, "willful and intentional" contemplates an action that is so "patently egregious and unlawful that anyone undertaking the conduct should have known it unlawful" or conduct committed "without grounds for believing it to be lawful" or action "flagrantly disregarding others' rights under the Act." *Andrews,* 838 F.2d at 425; *see also Scrimgeour,* 149 F.3d at 326; *Waters v. Thornburgh,* 888 F.2d 870, 875 (D.C.Cir. 1989). Other courts, however, have suggested that establishing that the agency acted with gross negligence is sufficient. *See, e.g., Chapman v. National Aeronautics and Space Admin.,* 736 F.2d 238, 243 (5th Cir. 1984); *Albright,* 732 F.2d at 189 & n.25. Also, at least one circuit has stated that an agency's failure to comply with its own established policy might constitute willful and intentional conduct. *See White v. Office of Personnel Management,* 840 F.2d 85, 87 (D.C.Cir. 1988); *see also Romero-Vargas,* 907 F. Supp. at 1133-34.

Resolution of the issue at bar does not require this court to further grapple with the intricacies of the definition. Rather, I find that the Department's conduct in the case

exceeded gross negligence. The Department's indiscriminate release of social security numbers illustrated, in my view, a flagrant disregard for the rights of black lung claimants. *See Waters,* 888 F.2d at 875. Even the most cursory reading of the Privacy Act suggests that Congress was motivated in passing the Act by the devastating effects that disclosure of one's social security number can bring. *See* Pub. L. No. 93-579, § 7(a)(1), 88 Stat. 1895, 1909 (codified at 5 U.S.C.A. § 552a Historical And Statutory Notes (West 1996)). The Department's decision to disseminate a claimant's social security number went beyond release to many other black lung claimants, their attorneys, coal companies and insurance companies. As the Department was well aware, the social security numbers also were subsequently reported in published compilations of black lung opinions. The undisputed evidence shows that the Department took little, if any, action to see that it complied with the Privacy Act. *See Romero-Vargas,* 907 F. Supp. at 1134 (no effort to protect privacy rights constitutes willful and intentional violation of the Act). Several of the Administrative Law Judges responsible for sending out the multi-captioned hearing notices testified that they had received no training on the Privacy Act. (Deposition of Edward Terhune Miller, Pages 13, 21; Deposition of Richard K. Malamphy, Page 15; Testimony of Chief ALJ Vittone, Docket Item No. 67, Page 37; Testimony of Associate Chief Judge Burke, Docket Item No. 67, Page 148.) In fact, there appears to have been no Department requirement for such training until regulations were promulgated in 1999 requiring periodic training for all Department employees with Privacy Act responsibilities. *See* 29 C.F.R. § 71.15 (1999). Furthermore, the Department's argument that it had routinely disclosed claimants' social security numbers for more than 20 years without any previous complaints does not provide proof that

its actions were not intentional and willful, and it does not create any genuine issue of fact on this issue. Therefore, I recommend that the court find that the Department's actions were intentional and willful.

The Department also contends that it is entitled to summary judgment because none of the Plaintiff's have produced any evidence showing that they suffered any "actual damages" as a result of the disclosure of their social security numbers. In particular, the Department argues that none of the Plaintiffs have produced any evidence of any out-of-pocket expenses, such as medical bills or financial losses. The Plaintiffs argue that they have shown damages by showing that they have suffered emotional distress as a result of the disclosure, and, therefore, they should be entitled to receive at least the statutory damages provided for in the Act.

Section 552a(g)(4) of the Privacy Act states:

> In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of—
>
> (A) *actual damages sustained* by the individual as a result of the refusal or failure, but in no case shall *a person entitled to recovery* receive less than the sum of $1,000....

5 U.S.C.A. § 552a(g)(4) (West 1996) (Emphasis added).

The courts which have considered this issue have adopted opposing views. Furthermore, these cases are complicated by the fact that many courts appear to confuse the adverse effect standing requirement with the actual damages

requirement. *See, e.g., Albright,* 732 F.2d at 186; *Romero-Vargas,* 907 F. Supp. at 1134-35. Some courts have taken the approach that a plaintiff must show actual pecuniary loss in order to bring a claim under the Privacy Act. *See Hudson v. Reno,* 130 F.3d 1193, 1207 (6th Cir. 1997) (actual damages under the Act do not include recovery for "mental injuries, loss of reputation, embarrassment or other non-quantifiable injuries"); *Fitzpatrick v. IRS,* 665 F.2d 327, 331 (11th Cir. 1982); *see also DiMura v. Federal Bureau of Investigation,* 823 F. Supp. 45, 47-48 (D.Mass. 1993) (Act permits recovery for only pecuniary loss); *Pope v. Bond,* 641 F. Supp. 489, 501 (D.D.C. 1986) (actual damages under the Act do not include damages for emotional trauma, anger, fright or fear).

Other courts have held that a plaintiff may recover statutory damages upon a showing of emotional distress. *See Wilborn v. Dept. of Health & Human Services,* 49 F.3d 597, 603 (9th Cir. 1995); *Albright,* 732 F.2d at 186 (emotional injuries may qualify as actual damages under the Act if causation can be proven); *Johnson v. IRS,* 700 F.2d 971, 986 (actual damages under the Act allows compensation for proven mental and physical injuries); *Parks,* 618 F.2d at 682-83; *Romero-Vargas,* 907 F. Supp. at 1134; *Andrews v. Veterans Admin.,* 613 F. Supp. 1404, 1415-16 (D.Wyo. 1985), *reversed on other grounds* 838 F.2d 418 (10th Cir. 1988) (as noted above, Administration not liable for Privacy Act violation, unless the plaintiff shows that the violation meets the standard for "willful or intentional" conduct). *See also Rorex v. Traynor,* 771 F.2d 383, 387 (8th Cir. 1985), and *Hrubec v. Nat'l R.R. Passenger Corp.,* 829 F. Supp. 1502, 1506 (N.D.Ill. 1993) (actual damages for knowing and negligent disclosure of federal tax return information includes compensation for emotional distress).

After reviewing these cases, I am persuaded that a plaintiff should be able to recover the statutory damages provided for in the Act upon a showing that he has suffered emotional distress. As recognized by the District Court in *Romero-Vargas,* I believe this interpretation comports with the Supreme Court's general holding that the primary damage in privacy cases is mental distress, *see Romero-Vargas,* 907 F. Supp. at 1134 (citing *Time, Inc. v. Hill,* 385 U.S. 374 (1967)), and with the legislative history and purpose of the statute. *See* S. Rep. No. 93-1183 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6916. Furthermore, mental or emotional distress is the normal and typical damage resulting from an invasion of privacy. *See Johnson,* 700 F.2d at 977. As the Fifth Circuit stated in *Johnson:*

> A federal act affording special protection to the right of privacy can hardly accomplish its purpose of protecting a personal and fundamental constitutional right if the primary damage resulting from an invasion of privacy is not recoverable under the major remedy of 'actual damages' that has been provided by Congress.

Johnson, 700 F.2d at 977.

A plaintiff, however, should be allowed to recover only for those actual damages which he can prove. *See Johnson,* 700 F.2d at 980; *but see Wilborn,* 49 F.3d at 603 (summary judgment for plaintiff acceptable when plaintiff only seeks statutory minimum of $1,000). Therefore, each of the Plaintiffs' claims in these cases, with the exception of the claims of Buck Doe, must fall to summary judgment on this issue, because none has provided any proof of damages. As stated above, none of the Plaintiffs, other than Buck Doe, have filed any affidavits asserting that they have suffered any damages, emotional or otherwise. Only two of the named Plaintiffs, Robert Doe and Buck Doe, and two of the

individuals who have moved to intervene, R.A. Doe and Dallas Doe, have offered any testimony for the court's consideration, and this testimony, with the exception of Dallas Doe's testimony, does not contain any evidence that they suffered any financial loss, out-of-pocket expense or emotional distress as a result of the Department's disclosure of their social security numbers.

On the other hand, Buck Doe has proffered evidence by way of affidavit. (Docket Item No. 14), which states that he suffered emotional distress as a result of his social security number being disclosed by the Department. Therefore, I find that Buck Doe has produced evidence of damages and causation sufficient to withstand the Department's motion for summary judgment.[9] *See Johnson,* 700 F.2d at 980.

In reaching this conclusion, I am mindful of Congress' purposes in enacting the Act. Specifically, I am mindful that Congress intended the Act to be a self-help enforcement program, which would encourage the filing of lawsuits to protect an individual against unnecessary invasions of

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[9] Dallas Doe, likewise, has testified that the Department's disclosure of his social security number has caused him emotional distress. Dallas Doe is the only individual who has moved to intervene in this case who has produced any evidence of damages. Since the court has not yet granted Dallas Doe's motion to intervene, I do not address the issue of whether his testimony alone would be sufficient proof to present an issue of fact with regard to the cause of his alleged mental or physical condition and subsequent medical treatment. *See Houlihan v. Office of Personnel Management,* 909 F.2d 383, 384-85 (9th Cir. 1990); *see also McKenna v. Pacific Rail Service,* 32 F.3d 820, 833-34 (3d Cir. 1994). I do believe, however, that Buck Doe's testimony is sufficient proof to raise an issue of fact as to the causation of his emotional distress, because he is not alleging distress of a severity which required medical treatment. *See Quinn,* 978 F.2d at 135-36; *Johnson,* 700 F.2d at 973-74; *see also Shuman v. Standard Oil Co. of California,* 453 F. Supp. 1150, 1154 (N.D.Cal. 1978).

privacy. *See Parks,* 618 F.2d at 685. Nonetheless, I cannot ignore the language of the remedies provisions of the Act. *See Hudson,* 130 F.3d at 1199. As stated above, § 552a(g)(4)(A) of the Act states that an agency which has violated the Act shall be liable to an individual in an amount equal to "actual damages sustained." I interpret this as requiring a plaintiff to both plead and prove damages before being entitled to any recovery, including the statutory damages provided. *See Molerio v. F.B.I.,* 749 F.2d 815, 826 (D.C.Cir. 1984).

Plaintiffs further allege that the Department has violated their constitutional right to privacy by disclosing their social security numbers. While Plaintiffs' counsel candidly acknowledges the lack of precedential case law on this point, he cites to the *Greidinger* case for support. In *Greidenger,* the Fourth Circuit opined that disclosure of social security numbers constitutes a "clearly unwarranted invasion of privacy." 988 F.2d at 1354. The Fourth Circuit did not, however, state in *Greidinger* that disclosure of an individual's social security number violated a constitutional right of privacy. I concur with the view held by other courts which have considered this issue and have held that disclosure of an individual's social security number does not so threaten the sanctity of individual privacy as to require constitutional protection. *See McElrath v. Califano,* 615 F.2d 434, 441 (7th Cir. 1980); *Doyle v. Wilson,* 529 F. Supp. 1343, 1348 (D.Del. 1982); *Greater Cleveland Wel. Rights Org. v. Bauer,* 462 F. Supp. 1313, 1318-19 (N.D.Ohio 1978); *Cantor v. Supreme Court of Pennsylvania,* 353 F. Supp. 1307, 1321-22 (E.D.Pa. 1973); *Conant v. Hill,* 326 F. Supp. 25, 26 (E.D.Va. 1971). *See also Ferguson v. City of Charleston,* 186 F.3d 469, 481-83 (4th Cir. 1999).

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

As supplemented by the above summary and analysis, the undersigned now submits the following formal findings, conclusions and recommendations:

1. Based on the personal nature of their claims, the Plaintiffs' claims are not typical of those of all class members as required by Federal Rule of Civil Procedure 23(a);

2. The Plaintiffs' motion to certify this case as a class action should be denied;

3. The social security numbers at issue in this case constitute records as defined by the Privacy Act;

4. By voluntarily providing their social security numbers on the black lung Claim Form, the Plaintiffs did not consent to the use of these numbers on multi-captioned hearing notices or the publishing of these numbers in black lung opinions;

5. The Department's use of Plaintiffs' social security numbers on multi- captioned hearing notices and in black lung opinions does not qualify as a "routine use" permitted by the Privacy Act;

6. The Department's use of the Plaintiffs' social security numbers on multi- captioned hearing notices or in black lung opinions qualifies as a disclosure under the Privacy Act;

7. The Department's disclosure of the Plaintiffs' social security numbers are not exempt under the Privacy Act because black lung hearings are public proceedings;

8. The Plaintiffs have suffered an adverse effect by the Department's disclosures of their social security numbers;

9. The Department's disclosure of Plaintiffs' social security numbers was intentional and willful under the Privacy Act;

10. The Department's disclosure of Plaintiffs' social security numbers violated the Privacy Act;

11. The Privacy Act allows recovery for emotional injury unaccompanied by pecuniary loss;

12. None of the Plaintiffs in this case, with the exception of Buck Doe, produced any evidence that they suffered any emotional distress as a result of the Department's disclosure of their social security numbers;

13. Buck Doe has produced evidence which creates a genuine issue of material fact as to whether he suffered any damages as a result of the Department's disclosure of his social security number;

14. The Department's disclosure of the Plaintiffs' social security numbers did not violate the Plaintiffs' constitutional right of privacy; and

15. Therefore, the court should issue summary judgment in favor of the Department on all of the Plaintiffs' claims, except for Buck Doe's claim.

RECOMMENDED DISPOSITION

Based on the above stated reasons, I recommend that the court deny the Plaintiffs' Motion To Certify Class Action, (Docket Item 23), and motion for summary judgment, (Docket Item No. 11), and grant the Department's motion for summary judgment, (Docket Item No. 21), as to each

named Plaintiff except Buck Doe. I recommend that the court find that Buck Doe has presented evidence of his alleged damages and causation sufficient to survive the Department's motion for summary judgment.

Notice to Parties

Notice is hereby given to the parties of the provisions of 28 U.S . C.A. § 636(b)(1)(C) (1993):

> Within ten days after being served with a copy [of this Report and Recommendation], any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendation to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge]. The judge may also receive further evidence to recommit the matter to the magistrate [judge] with instructions.

Failure to file written objection to these proposed findings and recommendations within 10 days could waive appellate review. At the conclusion of the 10-day period the Clerk is directed to transmit the record in this matter to the Honorable Glen M. Williams, Senior United States District Judge.

The clerk is directed to send copies of this Report and Recommendation to all counsel of record at this time.

5 U.S.C. § 552a

UNITED STATES CODE
TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
CHAPTER 5--ADMINISTRATIVE PROCEDURE

§ 552a. Records maintained on individuals

(g)(1) Civil remedies.--Whenever any agency

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

(B) refuses to comply with an individual request under subsection (d)(1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was

intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of--

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

Supreme Court, U.S.
FILED
MAR 29 2003
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No. 02-1377

In the Supreme Court of the United States

BUCK DOE, PETITIONER

v.

ELAINE L. CHAO, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether, under the Privacy Act, 5 U.S.C. 552a, an individual who has proven a violation of the Privacy Act, but cannot prove actual damages, is automatically entitled to $1000 in damages.

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In the Supreme Court of the United States

No. 02-1377

BUCK DOE, PETITIONER

v.

ELAINE L. CHAO, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-60a) is reported at 306 F.3d 170. The decision of the district court (Pet. App. 61a-68a), adopting in part the report and recommendation of the magistrate judge (Pet. App. 69a-104a), is unreported.

JURISDICTION

The court of appeals entered its judgment on September 20, 2002. A petition for rehearing was denied on November 15, 2002. Pet. App. 1a-2a. On January 23, 2003, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including March 15, 2003, and the petition was filed on March 14, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Privacy Act, 5 U.S.C. 552a, regulates executive agencies' disclosure of private, personal information, including social security numbers, to other governmental components and to the public. The Privacy Act authorizes private civil actions when an agency, *inter alia*, "fails to comply" with the terms of the Privacy Act "in such a way as to have an adverse effect on an individual." 5 U.S.C. 552a(g)(1)(D). If the agency "acted in a manner which was intentional or willful," the United States

> shall be liable to the individual in an amount equal to the sum of—
>
> (A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and
>
> (B) the costs of the action together with reasonable attorney fees as determined by the court.

5 U.S.C. 552a(g)(4).

2. The Department of Labor's Office of Worker Compensation Programs has long used the voluntarily provided social security numbers of claimants seeking Black Lung Benefits as internal identifiers in the adjudication of their claims. Prior to this case, administrative law judges responsible for Black Lung Benefits cases routinely issued multi-captioned hearing notices containing those same black-lung claim identifiers—that is, the claimants' social security numbers—to claimants, their attorneys, coal companies, and insurance carriers. The administrative law judges also frequently issued opinions, some of which were published,

that included the claimants' social security numbers as their black-lung claim identifiers. See Pet. App. 5a.[1]

Petitioner and six other black-lung claimants filed lawsuits against the Secretary of Labor under the Privacy Act, alleging that the Department's practice of disclosing claimants' social security numbers to third parties while processing Black Lung Benefits claims violates the Privacy Act. Pet. App. 5a-6a. The cases were consolidated, and the Department consented to the entry of a stipulated order under which it agreed to discontinue its use of social security numbers on multi-captioned hearing notices and to otherwise ensure that its Black Lung Benefits program complied with the Privacy Act. *Id.* at 6a. The plaintiffs then sought to certify a class of "all claimants for Black Lung Benefits since the passage of the Privacy Act." *Ibid.* In support of a claim for damages, petitioner submitted an affidavit in which he stated that the disclosure of his social security number had "torn me all to pieces," and that "no amount of money could compensate me for worry and fear of not knowing when someone would use my name and social security number." *Id.* at 76a.

The district court denied class certification and granted summary judgment for the Department with respect to all claims for damages, except for petitioner's. Pet. App. 61a-68a; see also *id.* at 69a-104a (report and recommendation of magistrate judge). With respect to petitioner, the district court agreed

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[1] While the external disclosure of social security numbers was erroneous, the Office of Workers Compensation Programs was authorized, under the Privacy Act, 5 U.S.C. 552a(b)(3), to use the claimants' social security numbers as internal identifiers and to disclose them to parties associated with each claimant's case. See 58 Fed. Reg. 49,548, 49,597 (1993) (notice of routine use).

with the government that proof of actual damages was required, *id.* at 66a & n.2, but concluded that petitioner had submitted "sufficient incontrovertible evidence * * * that he suffered 'actual damages,' in the form of emotional distress," and awarded him the "statutory minimum amount" of damages of $1000, *id.* at 66a-67a.

3. a. The court of appeals reversed the district court's grant of summary judgment to petitioner, and otherwise affirmed the district court's grant of summary judgment to the Department. Pet. App. 3a-60a.[2] The court rejected petitioner's argument that he was automatically entitled to recover $1000 for having proven an intentional or willful violation of the Privacy Act, holding that the Privacy Act's remedial provision requires plaintiffs to demonstrate some "actual damages" before they may recover the statutory minimum award of $1000. *Id.* at 9a.

The court of appeals noted, first, that Congress restricted the minimum $1000 damages award to a "person entitled to recovery," 5 U.S.C. 552a(g)(4)(A). By placement of that phrase within a subsection "the sole and entire purpose of which is to limit the liability of the United States to actual damages sustained," Pet. App. 9a, the court explained, "Congress has defined 'recovery' (albeit indirectly) by its express limitation of the Government's liability to actual damages sustained." *Ibid.* The provision thus serves only to "provide[] for a 'statutory minimum' to actual damages" in cases "where actual damages are greater than $0 but less than $1,000." *Ibid.* That reading "gives effect to the eminently reasonable * * * presumption that the legislature correlated the plaintiff's recovery entitlement with the defendant's liability by limiting the plaintiff's recovery to actual damages and by providing, by way of incentive to suit, for at least a minimum recovery even where actual damages are minimal." *Id.* at 10a. At the same time, the court concluded, Congress's decision only "to *augment* damages awards for persons able to demonstrate some 'actual damages' * * * serve[d] a competing objective: preventing the imposition of potentially substantial liability for violations of the Act which cause no 'actual damages' to anyone." *Id.* at 11a n.2.

The court also found its reading to be compelled "as a grammatical matter," because, "having just defined the recovery that will be permitted against the United States" in terms of actual damages, "it would torture all grammar to conclude that the phrase 'a person entitled to recovery' references anyone other than one who has sustained actual damages." Pet. App. 10a (emphasis omitted). Had Congress intended to allow an automatic award of $1000, without any showing of actual damages, the court explained, it could have done so "unequivocally" through "clear" language. *Id.* at 10a-11a.

Finally, because the Privacy Act's remedial provisions are a limited waiver of sovereign immunity, the court concluded that the scope of the waiver had to be "strictly construed . . . in favor of the sovereign." Pet. App. 13a-14a (citation omitted).

Having predicated petitioner's entitlement to recovery on a showing of actual damages, the court concluded that petitioner's allegations of emotional upset, which did not include "any evidence of tangible consequences stemming from his alleged angst over the disclosure of his [social security number]," Pet. App.

[2] None of the other plaintiffs has sought this Court's review of the court of appeals' judgment affirming dismissal of their claims.

17a, did not constitute sufficient evidence of actual damages to sustain an award under Section 552a(g)(4)(A).[3]

b. Judge Michael dissented from the court's holding that an individual must prove actual damages to receive an award of $1000 under Section 552a(g)(4)(A). Pet. App. 24a-60a. Admitting that the "question is somewhat close," *id.* at 30a, and that his reading of the statute "is not inevitable," *id.* at 45a, Judge Michael would have held that a plaintiff "can recover statutory damages of $1,000 upon proof that he has suffered an adverse effect as a result of an intentional or willful violation of the Privacy Act," *id.* at 25a. In Judge Michael's view, that reading better comports with "policy considerations" and "Congress's purposes." *Id.* at 47a.

ARGUMENT

Because the decision of the court of appeals is correct and there is no mature conflict in the courts of appeals, this Court's review is not warranted.

1. Petitioner contends (Pet. 11-12) that this Court should grant review to resolve a conflict in the circuits on whether a plaintiff must prove actual damages to receive a $1000 award under Section 552a(g)(4)(A). No such concrete circuit conflict exists. The Sixth Circuit appears to share the Fourth Circuit's view. *Hudson* v. *Reno*, 130 F.3d 1193, 1207 (6th Cir. 1997), cert. denied, 525 U.S. 822 (1998), overruled in part on other grounds, *Pollard* v. *E.I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001). Beyond that, the court of appeals' opinion in this case is the first to undertake a direct and considered analysis of the question. All of the court of

[3] Petitioner has not sought further review of that aspect of the court of appeals' holding.

appeals' decisions on which petitioner relies simply mention the availability of relief in passing, while resolving other questions under the Privacy Act, or order relief in the absence of any dispute between the parties about the scope of the remedy. See Pet. App. 12a n.3 ("Nor has any court examined closely the question we consider today, and none has analyzed the text of the statute at all.").

Petitioner relies primarily (Pet. 11) on the Eleventh Circuit's decision in *Fitzpatrick* v. *IRS*, 665 F.2d 327 (1982). That case, however, decided only the question whether Section 552a(g)(4)(A)'s use of the phrase "actual damages" refers to general or compensatory damages or, instead, to out-of-pocket pecuniary losses. See *id.* at 328 (reciting court's holding). The court did not analyze the separate question of whether any showing of damages was necessary to recover the $1000, simply referring to it as "the statutory minimum." *Ibid.* Furthermore, the Internal Revenue Service, as appellee in that case, did not contest the plaintiff's entitlement to that $1000 award. *Id.* at 329. The court thus had no occasion to address the question of statutory construction resolved by the court of appeals here.

Likewise, in *Johnson* v. *Department of Treasury*, 700 F.2d 971 (5th Cir. 1983), the question before the court was whether "actual damages" includes non-pecuniary damages for mental injuries. See *id.* at 972. In one footnote, the court of appeals commented that "[t]he statutory minimum of $1000, of course, is recoverable." *Id.* at 977 n.12. But that was dictum, entirely unnecessary to the resolution of the case, in which the plaintiff was granted recovery based on a finding that he suffered actual damages. *Id.* at 986. The comment is also in tension with the court's acknowledgment that Congress "reject[ed] liability for presumed damages,"

id. at 982, and that Congress was "concerned about the drain on the treasury created by a rash of Privacy Act suits," *id.* at 978 n.15 (citation omitted). See also *Parks* v. *IRS*, 618 F.2d 677 (10th Cir. 1980) (cited at Pet. 12) (deciding only that mental distress or psychological harm may constitute actual damages).

Wilborn v. *Department of Health & Human Services*, 49 F.3d 597 (9th Cir. 1995), is also of no help to petitioner. That case decided liability issues under the Privacy Act, and it was only in closing that the court noted that "Wilborn has limited the damages he seeks to the statutory minimum of $1,000," and awarded him that amount. *Id.* at 603. Nothing in the opinion indicates that the award was made in the absence of some proof of actual damages. Contrary to petitioner's assertion (Pet. 12), the question also remains open in the D.C. Circuit. Compare *Waters* v. *Thornburgh*, 888 F.2d 870, 872 (D.C. Cir. 1989) (cited at Pet. 12) (addressing only liability issues under the Act and noting, ambiguously, that a plaintiff who establishes liability "is entitled to the greater of $1,000 or the actual damages sustained"), with *Molerio* v. *FBI*, 749 F.2d 815, 826 (D.C. Cir. 1984) (stating that a cause of action under the Privacy Act requires proof of "actual damages sustained").

In the absence of a concrete or mature conflict in the circuits, this question, which has been adverted to by courts of appeals only sporadically in the last 23 years, does not warrant this Court's review.[4]

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[4] Petitioner argues (Pet. 13-16) that the enactment of other statutes, such as the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, and the Electronic Communications Privacy Act of 1986, 18 U.S.C. 2707, enhances the importance of the question presented. But petitioner cites no evidence of conflicting court decisions arising under those statutes. Nor does he demonstrate that the construction of statutes like the Electronic Communications Privacy Act, which authorizes monetary remedies against parties "other than the United States," 18 U.S.C. 2707(a), would necessarily control the interpretation of a statute providing a limited waiver of the sovereign immunity of the United States from money damages.

2. Contrary to petitioner's argument (Pet. 16-20), the court of appeals' decision is correct. First, the phrase "person entitled to recovery" appears only after the statute has confined the remedy available to aggrieved individuals to "actual damages." The phrase is thus not logically or naturally read to disavow the very limitation on recovery—a showing of "actual damages" —that the Act just imposed. Instead, the structure of the sentence requires a plaintiff first to demonstrate "actual damages sustained" and, only then, does he become eligible for a minimum damages award of $1000. Had Congress intended to create an automatic damages award, it would likely have phrased the remedial provision with a disjunctive "or," permitting recovery of $1000 *or* "actual damages sustained."

Petitioner's supposition (Pet. 16) that "person entitled to recovery" refers to a plaintiff who has established liability ignores the fact that, throughout the remedial provision, a prevailing plaintiff is referred to as an "individual," not a "person entitled to recovery." See 5 U.S.C. 552a(g)(1)(A), (B), (C) and (D); 5 U.S.C. 552a(g)(2)(A) and (4). The label "person entitled to recovery" appears for the first and only time in the actual damages provision, and thus functionally serves to describe that particular class of prevailing individuals who have established some level of actual damages.

Second, because the Privacy Act's remedial provision constitutes a limited waiver of sovereign immunity, any

lingering ambiguity in the statutory language "is to be strictly construed, in terms of its scope, in favor of the sovereign." *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 261 (1999). Contrary to petitioner's view (Pet. 18), that rule of strict construction "applies even to determination of the scope of explicit waivers." *United States* v. *Williams*, 514 U.S. 527, 541 (1995) (Scalia, J., concurring) (citing *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 34 (1992)). Explicit waivers of sovereign immunity must not be "enlarge[d] . . . beyond what the language requires." *United States Dep't of Energy* v. *Ohio*, 503 U.S. 607, 615 (1992) (quoting *Eastern Transp. Co.* v. *United States*, 272 U.S. 675, 686 (1927)).

Third, contrary to petitioner's argument (Pet. 17), that reading harmonizes the statute's "adverse effect" and damages provisions. Section 552a(g)(1)(D) generally provides that an individual may sue an agency under the Privacy Act whenever the agency violates the statute "in such a way as to have an adverse effect" on the individual. 5 U.S.C. 552a(g)(1)(D). The requirement of an adverse effect does not speak to a plaintiff's recovery, however. It establishes standing under the Privacy Act. See *Quinn* v. *Stone*, 978 F.2d 126, 135 (3d Cir. 1992); *Parks*, 618 F.2d at 682-683 & n.2. It is well settled that a plaintiff may be able to satisfy standing requirements even if he cannot ultimately establish a right to money damages. *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998).[5]

---

[5] Petitioner's reliance (Pet. 19, 20) on snippets of legislative history characterizing the $1000 statutory damages remedy as "liquidated damages" is to no avail. That legislative history pertained to a prior, more generous version of the legislation that was never enacted. Beyond that, the argument overlooks that "[a] statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text." *Lane* v. *Pena*, 518 U.S. 187, 192 (1996); see also *Nordic Vill.*, 503 U.S. at 37 ("If clarity does not exist [in statutory text], it cannot be supplied by a committee report.").

Finally, petitioner's reliance (Pet. 20) on the Privacy Act Guidelines issued by the Office of Management and Budget (OMB) is misplaced. The Guidelines do not address the predicate issue of whether some showing of actual damages must be made before a recovery will be allowed. They provide only that a liable agency will be required to pay "[a]ctual damages or $1,000, whichever is greater," when found guilty of intentional or willful violations of the Privacy Act. 40 Fed. Reg. 28,970 (1975). Indeed, in recognition of the principle that waivers of sovereign immunity must be strictly construed, OMB does not construe its Guidelines to require the payment of $1000 in the absence of any showing of actual damages.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

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BUCK DOE,

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v.

ELAINE L. CHAO, SECRETARY OF LABOR,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY FOR THE PETITIONER

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REPLY FOR THE PETITIONER

1. **Introduction.** The government does not dispute — and, indeed, concedes (Opp. 6) — that there is a conflict among the courts of appeals on the issue of whether an individual who has shown that the United States is "liable" for an "intentional or willful" violation of the Privacy Act that caused an "adverse effect" must further prove some measure of "actual damages" to be entitled to a Section 552a(g)(4) statutory damages award of $1,000. Pet. 11-12. Nor does the government dispute Doe's showing that this issue is an important and recurring question that merits this Court's review. Pet. 13-16.

Instead, the government contends (Opp. 6-8) that the conflict is neither "mature" nor "concrete." As Doe showed in his petition (Pet. 11-12), and shows again below, the government is wrong. The conflict is mature, concrete, and — underscoring the need for immediate review — has deepened since Doe filed his petition. The government devotes the remainder of its opposition (Opp. 9-11) to a merits argument in support of its interpretation of the Privacy Act. Doe, of course, agrees that the Court should address the merits of this issue. But the government's merits arguments only highlight the statutory anomalies created by its preferred interpretation.

2. **The circuit conflict is mature, concrete, and deepening.** Forced to admit the circuit conflict on the question presented (Opp. 6), the government insists it is not "mature" or "concrete." This position is both contrary to the government's own statement to the court below — where it candidly "acknowledge[d]" that "circuits have reached the opposite result and awarded $1,000 recoveries without requiring proof of actual damages" (Brief for Appellee-Cross-Appellant, *Doe v. Chao*, 306 F.3d 170 (4th Cir. 2002), at 21) — and wrong. This position is also contrary to the majority and dissenting opinions below, which acknowledged the pervasive conflict. App. 12a & n.3, 33a-34a. Moreover, since

the petition was filed, the First Circuit has deepened the split, which now involves eight courts of appeals divided six-to-two.

In *Orekoya v. Mooney*, No. 02-1306, __ F.3d __, 2003 WL 21093551 (1st Cir. May 15, 2003), the First Circuit expressly rejected the decision below and instead "join[ed] the rule adopted by the majority of circuits that have addressed this issue" by agreeing "with the dissent in *Doe* that the most natural and reasonable reading of the statute is that statutory damages, if not actual damages, are available to individuals who suffer adverse effects from intentional and willful violations of the act . . . ." *Id.* at *7. The court held that "[i]nherent" in decisions of the Fifth, Ninth, Tenth, Eleventh, and D.C. Circuits "is an analysis that Congress would not have granted standing to pursue an action for civil remedies to those who suffered an adverse effect caused by an intentional or willful violation and then afforded no remedy at all for the adverse effect." *Id.* at *6. Morever, the majority rule is "most consistent with the legislative history" and "the interpretation adopted by OMB." *Id.* at *7. The government did not mention the First Circuit's recent decision in its opposition, but it cannot dispute that this express, direct, and thorough rejection of the majority's decision below reveals a "concrete" split of authority.

Even apart from the First Circuit's recent decision, the government's effort (Opp. 6-8) to characterize the conflict as not "mature" or "concrete" fails.

Fitzpatrick v. IRS, 665 F.2d 327 (11th Cir. 1982), squarely addressed the question presented here. After holding that appellant's mental injuries were not "actual damages" under the Privacy Act and noting no other proof of actual damages, the Eleventh Circuit was required to — and did — determine whether it could nonetheless uphold the district court's $1,000 statutory damages award. *Id.* at 330-31. The court concluded that Section 552a(g)(4)(A)'s statutory damages provision "avoid[s] a situation in which persons suffering injury had *no*

provable damages and hence *no incentive to sue*." *Id.* (emphasis added). Accordingly, it affirmed the $1,000 statutory damages award despite no proven actual damages. *Id.*

On its face, *Wilborn v. Department of Health and Human Services*, 49 F.3d 597 (9th Cir. 1995), "indicates that the award was made in the absence of some proof of actual damages." Opp. 8. After holding that the disclosure victim was entitled to summary judgment, the Ninth Circuit further held that no remand for an actual damages determination was necessary because the victim had limited his sought-after damages "to the statutory minimum of $1,000." 49 F.3d at 603. The court then expressly endorsed *Fitzpatrick*'s holding that the "purpose of the minimum damage provision is to give those with 'no provable damages' the incentive to sue," and "direct[ed] the entry of judgment . . . in the sum of $1,000." *Id.*

Johnson v. Department of Treasury, 700 F.2d 971 (5th Cir. 1983), held that the "statutory minimum of $1000, of course, is recoverable" without proof of actual damages. *Id.* at 977 & n.12. And this holding was not mere "dictum." Opp. 7. The decision below recognized *Johnson* as a conflicting decision (App. 12a & n.3, 33a-34a), and the First Circuit acknowledged in *Orekoya* that the Fifth Circuit allows statutory damages without proof of actual damages. 2003 WL 21093551, at *6. Most importantly, lower courts in the Fifth Circuit adhere to the rule announced in *Johnson*. *See, e.g, Ramon v. EEOC*, No. H-85-431A, 1986 WL 501, at *5 (S.D. Tex. Nov. 26, 1986), *aff'd*, 844 F.2d 786 (5th Cir. 1988).

Parks v. IRS, 618 F.2d 677 (10th Cir. 1980), did not "decid[e] only that mental distress or psychological harm may constitute actual damages." Opp. 8. Rather, the Tenth Circuit held that a Privacy Act claim is stated "even though the plaintiff suffered no pecuniary loss nor physical harm" where a plaintiff alleges an "adverse effect" in the form of

"psychological harm" and sufficient allegations of "intentional or willful misconduct." 618 F.2d at 683. Congress built into the Privacy Act a "self-help enforcement program" that "encourages the filing of lawsuits, for it is only through this process that the objects of the Act can be realized." *Id.* at 685. Accordingly, the Act "is to be treated in the spirit which attended its enactment" (*id.*), and thus cannot be read to condition statutory damages on proof of actual damages.

Finally, *Molerio v. FBI*, 749 F.2d 815 (D.C. Cir. 1984), does not establish that the question presented "remains open in the D.C. Circuit." Opp. 8. *Molerio* did not discuss Section 552a(g)(4) at all. Rather, it held that there was no causal link between the actions alleged to violate the Privacy Act and the claimed adverse effect, thus prohibiting any recovery. 749 F.2d at 826. In contrast, *Waters v. Thornburgh*, 888 F.2d 870 (D.C. Cir. 1989), expressly held that an individual who suffers an adverse effect as a result of an intentional violation of the Privacy Act is "entitled to the greater of $1000 *or* the actual damages sustained." *Id.* at 872 (emphasis added). The government cannot credibly contend that this holding is "ambiguous[]" (Opp. 8); the D.C. Circuit used the very words that the government argues (Opp. 9) unambiguously state a right to an "automatic damages award." Moreover, *Tomasello v. Rubin*, 167 F.3d 612 (D.C. Cir. 1999), which the government does not mention in its opposition, upheld a statutory damages award even though the aggrieved individual neither proved pecuniary losses nor argued that he was entitled to emotional distress damages. *Id.* at 614, 618 & n.6; *see* Pet. 12.

3. **The government's merits arguments only emphasize the statutory anomalies that flow from its preferred interpretation of the Privacy Act.** Doe demonstrated (Pet. 16-18) that the Privacy Act permits an award of $1,000 statutory damages without proof of actual damages. This reading is faithful to Section 552a(g)(4)'s plain text, gives meaning and consistency to each of the Act's civil remedies

provisions, comports with the Act's purposes as expressed in the text and legislative history, and is consistent with OMB's administrative interpretation.

The government contends (Opp. 9) that its contrary interpretation is the only possible "logical[]" or "natural[]" one. But even the majority below, whose analysis the government parrots, admitted that this interpretation is not "strictly compelled by the statute's language." App. 13a. And the government's attempt to paper over the statutory anomalies produced by its acontextual interpretation succeeds only in highlighting and exacerbating them.

The government argues (Opp. 9) that Section 552a(g)(4)(A)'s use of the term "person entitled to recovery . . . functionally serves to describe that particular class of prevailing individuals who have established some level of actual damages" — an interpretation that necessarily contemplates a class of "prevailing" individuals who are entitled to *no recovery at all.*[1] This argument is certainly contrary to the ordinary definition of a "prevailing" party. *Cf. Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 603-04 (2001) (a plaintiff must "'receive at least some relief on the merits of his claim before he can be said to prevail'" (quoting *Hewitt v. Helms*, 482 U.S. 755, 760 (1987)). It is also contrary to the government's own interpretation of the Act. Because the government contends that pleading and proof of actual damages is a necessary element of a Privacy Act claim, its absence would entitle the government to a dismissal or summary judgment; indeed, this is the very reason the decision below ordered summary judgment against Doe. An individual

[1] The Privacy Act does not permit injunctive relief in suits, like the present one, brought pursuant to Section 552a(g)(1)(D) for wrongful disclosures. *See* 5 U.S.C. §§ 552a(g)(1)(D), (g)(4); Pet. 4 n.1.

like Doe who finds himself on the wrong end of such a ruling can hardly be described as "prevailing."

The government strives (Opp. 10) — but fails — to give independent meaning to Section 552a(g)(1)(D)'s "adverse effect" requirement. *See* Pet. 17. Under the government's reading of the Act, a plaintiff must allege sufficient facts to support a claim for "actual damages" as a necessary element of his claim. Supportable allegations of this sort would necessarily satisfy the standing doctrine's "distinct and palpable" injury, "causation," and "redressability" requirements. *See Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). Thus, while Doe agrees that the "adverse effect" requirement serves a standing function (Pet. 17), that function is independently meaningful only if the Act permits a statutory damages award absent proof of actual damages.

Faced with these anomalies, and others demonstrated by Doe but not addressed by the opposition (*see* Pet. 16-20), the government falls back on a "sovereign immunity" canon of construction. Doe showed (Pet. 18) that this canon is inapposite where, as here, a statute explicitly waives sovereign immunity to suit and liability for money damages. As this Court has held repeatedly, the "exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced." *United States v. Aetna Sur. Co.*, 338 U.S. 366, 383 (1949) (internal quotation marks and citation omitted). *Accord, e.g., United States v. Williams*, 514 U.S. 527, 540 (1995) (Scalia, J., concurring); *United States v. Yellow Cab Co.*, 340 U.S. 543, 554 (1951); *Canadian Aviator, Ltd. v. United States*, 324 U.S. 215, 222 (1945).[2]

---

[2] The government criticizes (Opp. 10 n.5) Doe's showing (Pet. 18-20) that the decision below is contrary to the Privacy Act's legislative history on two grounds. *First*, it contends that the "sovereign immunity" canon bars any use of legislative history as interpretive guidance. But this canon does not apply to the Privacy Act. *See supra*; Pet. 18. Even if it did, legislative history remains a relevant interpretive aid. *See West v. Gibson*, 527 U.S. 212, 217 (1999). *Second*, the government contends that the Senate was discussing a more "generous" bill when it characterized the civil remedies provision as affording "liquidated damages." Although it is true that the Senate bill differed in some respects from the final Act, the cited paragraph in the committee report discusses "liquidated damages" without reference to other, later-discarded components of the bill. *See* Comm. on Gov't Operations U.S. Senate and Comm. on Gov't Operations House of Representatives, *Legislative History of the Privacy Act of 1974 S. 3418 (Public Law 93-579) Source Book on Privacy* at 768 (1976). Moreover, the same need for a "liquidated damages" provision was asserted in debate over the less "generous" House bill. *See id.* at 330.

Finally, the government's assertion (Opp. 11) that OMB's guidelines "do not address the predicate issue of whether some showing of actual damages must be made before a recovery will be allowed" is flatly contradicted by its own argument two pages earlier in the opposition. There, the government argued that a clear entitlement to statutory damages absent proof of actual damages could be "phrased . . . with a disjunctive 'or,' permitting recovery of $1000 *or* 'actual damages sustained.'" Opp. 9. This is how OMB phrased its interpretive guideline — liability is for "*actual damages or $1,000, whichever is greater.*" 40 Fed. Reg. 28,949, 28,970 (July 9, 1975) (emphasis added); *see also Waters*, 888 F.2d at 872; *supra* p. 4. Moreover, the government's assertion that the OMB "does not construe its Guidelines to require the payment of $1,000 in the absence of any showing of actual damages" is unburdened by any citation. To the extent the Department of Labor can purport to speak for the OMB, this "position" is plainly newly-minted for this litigation and therefore entitled to no deference. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988).

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

June 2003

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No. 02-1377

IN THE

Supreme Court of the United States

BUCK DOE,

Petitioner,

v.

ELAINE L. CHAO, SECRETARY OF LABOR,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

JOINT APPENDIX

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Certiorari Granted June 27, 2003

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RELEVANT DOCKET ENTRIES

I. BEFORE THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, CASE NO. 2:97CV56

1.	2/20/97	Complaint filed.
2.	2/20/97	Motion to consolidate case with civil action number 97-0043-B.
3.	5/27/97	Motion to Consolidate Cases 97-43-B, 97-53 through 58-B by Cynthia A. Metzler.
4.	6/4/97	Order granting motion to Consolidate Cases 97-43-B, 97-53 through 58-B.
5.	6/4/97	Consolidated Member Case. Lead Case Number: 2:97-0043.

II. BEFORE THE UNITED STATES DISTRICT COURT WESTERN DISTRICT OF VIRGINIA, CASE NO. 2:97CV43

1.	2/13/97	Complaint and Motion for Temporary and Permanent Injunction.
2.	2/14/97	Order granting motion for the style of the case to be changed to Robert Doe a/k/a Virginia Privacy Litigation, denying motion for Temporary Restraining Order.
3.	2/21/97	Order and Stipulation of parties constituting a complete resolution of the issues raised in Plaintiff's 2/13/07 motion.
4.	5/27/97	Motion to Consolidate Cases 97-43-B, 97-53 through 58-B by Cynthia A. Metzer.
5.	6/4/97	Order granting motion to Consolidate Cases 97-43-B, 97-53 through 58-B.

6.	6/9/97	Answer to Complaint by Cynthia A. Metzler.
7.	7/30/97	Motion for Summary Judgment by Robert Doe.
8.	11/24/97	Cross Motion for Summary Judgment by Cynthia A. Metzler.
9.	12/24/97	Motion to Certify Class Action by Robert Doe et al.
10.	1/23/98	Motion to Stay Discovery by Cynthia A. Metzler.
11.	5/6/98	Motion hearing held at Big Stone Gap, re: motion to certify class action by movants, plaintiff.
12.	7/24/98	Supplemental Motion for Summary Judgment by Cynthia A. Metzler.
13.	3/9/99	Order wherein the motion for Summary Judgment referred to Magistrate Judge Pam M. Sargent, cross motion for Summary Judgment referred to Magistrate Judge Pam M. Sargent, motion for Summary Judgment referred to Magistrate Judge Pam M. Sargent.
14.	4/22/99	Pre-Trial Conference held.
15.	5/4/99	Order, Referring case to Magistrate Judge Pam M. Sargent regarding motion for class certification.
16.	10/29/99	Report and Recommendations of Magistrate Judge Pam M. Sargent.
17.	11/8/99	Objections by R.A. Doe report and recommendations.
18.	12/3/99	Objections by Cynthia A. Metzler report and recommendations.

19.	12/6/99	Motion to Amend complaint by R.A. Doe et al.
20.	12/6/99	Motion for Leave to File Affidavits in Support of Damages by R.A. Doe et al.
21.	5/23/00	In Chambers Motion hearing held re: motion for Leave to File Affidavits in Support of Damages by plaintiffs, and motion to Amend complaint by plaintiffs.
22.	5/24/00	Report and Recommendations of Magistrate Judge Pam A. Sargent.
23.	6/5/00	Objection to report and recommendation by Robert Doe.
24.	6/21/00	Supplemental Objections to report and recommendations by Tays Doe, Robert Doe, Buck Doe, Otis Doe, Thomas Doe, Joe Doe, Charles Doe.
25.	7/24/00	Order granting in part, denying in part motion for Summary Judgment, denying motion to certify class action, granting in part, denying in part cross motion for Summary Judgment. Judgment of $1,000 awarded only to Buck Doe.
26.	7/31/00	Case closed.
27.	9/21/00	Notice of Appeal by Robert Doe.
28.	9/22/00	Notice of Appeal by Cynthia A. Metzler/Alexis M. Herman.

III. BEFORE THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, CASE NO. 00-2247

1.	9/26/00	Civil case docketed.
2.	10/11/00	Order filed consolidating case 00-2292 with 00-2247.
3.	10/24/00	Order filed substituting party Alexis M. Herman for terminated party Cynthia A. Metzler in 00-2247, party Cynthia A. Metzler in 00-2292.
4.	12/12/00	Certification of ROA complete and retained in the District Court.
5.	2/1/01	Cross-appeal 30(c) briefing order filed.
6.	2/1/01	Page-proof cross-appeal brief filed by Appellant Robert Doe in 00-2247, Appellant Tays Doe in 00-2247, Appellant Buck Doe in 00-2247, Appellant Otis Doe in 00-2247, Appellant Thomas Doe in 00-2247, Appellant Joe Doe in 00-2247, Appellant Charles Doe in 00-2247, Appellee Robert Doe in 00-2292, Appellee Tays Doe in 00-2292, Appellee Buck Doe in 00-2292, Appellee Otis Doe in 00-2292, Appellee Thomas Doe in 00-2292, Appellee Joe Doe in 00-2292, Appellee Charles Doe in 00-2292.
7.	2/27/01	Order filed granting motion to substitute party Elaine L. Chao, Sec. Labor for terminated party Herman, Sec. in 00-2247, party Herman, Sec. in 00-2292.

8.	3/20/01	Page-proof cross-appeal brief filed by Appellee Chao, Sec. in 00-2247, Appellant Chao, Sec. in 00-2292.
9.	5/1/01	Page-proof cross-appeal reply brief by Appellant Robert Doe in 00-2247, Appellant Tays Doe in 00-2247, Appellant Buck Doe in 00-2247, Appellant Otis Doe in 00-2247, Appellant Thomas Doe in 00-2247, Appellant Joe Doe in 00-2247, Appellant Charles Doe in 00-2247, Appellee Robert Doe in 00-2292, Appellee Tays Doe in 00-2292, Appellee Buck Doe in 00-2292, Appellee Otis Doe in 00-2292, Appellee Thomas Doe in 00-2292, Appellee Joe Doe in 00-2292, Appellee Charles Doe in 00-2292.
10.	5/3/01	Rule 30(c) cross joint appendix filed by Appellant Robert Doe in 00-2247, Appellant Tays Doe in 00-2247, Appellant Buck Doe in 00-2247, Appellant Otis Doe in 00-2247, Appellant Thomas Doe in 00-2247, Appellant Joe Doe in 00-2247, Appellant Charles Doe in 00-2247, Appellee Robert Doe in 00-2292, Appellee Tays Doe in 00-2292, Appellee Buck Doe in 00-2292, Appellee Otis Doe in 00-2292, Appellee Thomas Doe in 00-2292, Appellee Joe Doe in 00-2292, Appellee Charles Doe in 00-2292.

11.	5/16/01	Rule 30(c) cross-brief filed by Appellant Robert Doe in 00-2247, Appellant Tays Doe in 00-2247, Appellant Buck Doe in 00-2247, Appellant Otis Doe in 00-2247, Appellant Thomas Doe in 00-2247, Appellant Joe Doe in 00-2247, Appellant Charles Doe in 00-2247, Appellee Robert Doe in 00-2292, Appellee Tays Doe in 00-2292, Appellee Buck Doe in 00-2292, Appellee Otis Doe in 00-2292, Appellee Thomas Doe in 00-2292, Appellee Joe Doe in 00-2292, Appellee Charles Doe in 00-2292.
12.	5/16/01	Rule 30(c) appellant(s) cross-reply brief filed by Appellant Robert Doe in 00-2247, Appellant Tays Doe in 00-2247, Appellant Buck Doe in 00-2247, Appellant Otis Doe in 00-2247, Appellant Thomas Doe in 00-2247, Appellant Joe Doe in 00-2247, Appellant Charles Doe in 00-2247, Appellee Robert Doe in 00-2292, Appellee Tays Doe in 00-2292, Appellee Buck Doe in 00-2292, Appellee Otis Doe in 00-2292, Appellee Thomas Doe in 00-2292, Appellee Joe Doe in 00-2292, Appellee Charles Doe in 00-2292.
13.	5/16/01	Rule 30(c) cross-brief filed by Appellee Chao, Sec. in 00-2247, Appellant Chao, Sec. in 00-2292.
14.	5/16/01	Rule 30(c) Appellee(s) cross-reply brief filed by Appellee Chao, Sec. in 00-2247, Appellant Chao, Sec. in 00-2292.
15.	08/23/01	Supplemental authorities filed by Appellee Chao, Sec. in 00-2247, Appellant Chao, Sec. in 00-2292.
16.	9/26/01	Oral argument heard.

17.	1/24/02	Supplemental authorities filed by Appellee Chao, Sec. in 00-2247, Appellant Chao, Sec. in 00-2292.
18.	3/28/02	Supplemental authorities filed by Appellee Chao, Sec. in 00-2247, Appellant Chao, Sec. in 00-2292.
19.	3/29/02	Supplemental authorities filed by Appellee Chao, Sec. in 00-2247, Appellant Chao, Sec. in 00-2292.
20.	8/29/02	Supplemental authorities filed by Appellee Chao, Sec. in 00-2247, Appellant Chao, Sec. in 00-2292.
21.	9/20/02	Published, authored opinion filed
22.	9/20/02	Judgment order filed. Decision: Affirmed in Part, Reversed in Part, and Remanded. Dissent.
23.	9/25/02	Motion filed by Appellee Chao, Sec. in 00-2247, Appellant Chao, Sec. in 00-2292 to amend opinion.
24.	10/02/02	Order amending opinion filed. Terminated motion to amend opinion.
25.	10/07/02	Order amending opinion filed.

26. 11/4/02 Petition filed by Appellant Charles Doe in 00-2247, Appellant Joe Doe in 00-2247, Appellant Thomas Doe in 00-2247, Appellant Otis Doe in 00-2247, Appellant Buck Doe in 00-2247, Appellant Tays Doe in 00-2247, Appellant Robert Doe in 00-2247, Appellant Dick Doe in 00-2247, Appellee Charles Doe in 00-2292, Appellee Joe Doe in 00-2292, Appellee Thomas Doe in 00-2292, Appellee Otis Doe in 00-2292, Appellee Buck Doe in 00-2292, Appellee Tays Doe in 00-2292, Appellee Robert Doe in 00-2292, for rehearing.

27. 11/15/02 Court Order filed denying motion for rehearing; denying motion for rehearing en banc.

28. 11/25/02 Mandate issued.

IV. BEFORE THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, CASE NO. 00-2292

1. 10/11/00 Civil case docketed.

2. 10/11/00 Order filed consolidating case 00-2292 with 00-2247.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

BUCK DOE a/k/a VIRGINIA PRIVACY LITIGATION, PLAINTIFF	)	
V.	)	CIV. ACT. NO 97-0056
CYNTHIA A. METZLER, ACTING SECRETARY OF DEPARTMENT OF LABOR, DEFENDANT	)	

COMPLAINT

The Plaintiff, Buck Doe (a pseudonym), makes the following representations to this Court.

1. The Plaintiff is a resident of the Commonwealth of Virginia and a citizen of the United States of America.

2. The Plaintiff complains of scores of violations of the Privacy Act, 5 U.S.C.S. Sec. 552a, by the Office of Administrative Law Judges, as to his name and Social Security number having been distributed on black lung notices of hearing to other claimants, coal companies, insurance companies, and other attorneys, all in violation of the Privacy Act.

3. He is advised that this is a common practice done to other claimants for black lung, and more specifically, variations of the name and Social Security number is released by all levels of the black lung program including mailings by the Office of Administrative Law Judges (name and Social Security number), mailings by attorneys for the Solicitor's Office (Social Security Number), and also mailings at the appellate level by the Benefits Review Board (Social Security number) all in knowing and intentional

violation of the Act (the latter two as to other claimants). Reference is made to the case of Robert Doe, Civil Action No. 97-0043-B and the exhibits therein are incorporated in and made a part of this Complaint, by reference.

4. These mailings (an institutional practice) are all common place in the black lung program.

5. The problem appears to have been created at the outset of the black lung program by the Office of Workers' Compensation Programs of the Department of Labor when a claimant's Social Security number was made the "OWCP number, i.e. OWCP No. 000-00-0000," and the entire Labor Department has indiscriminately used this number throughout the system as is shown on the exhibits referenced above. It is obvious to anyone that this 9-digit number is a claimant's Social Security number.

6. There have been thousands of violations in these mailings for other claimants in the recent past.

7. The plaintiff alleges that these violations of the Privacy Act have had an adverse effect on him in that his name and Social Security number have been distributed to all others receiving the notice of hearing, and to complete strangers, as part of the ongoing pattern of conduct by the U.S. Department of Labor and that this violates plaintiff's due process of law and a right of privacy under the United States Constitution and specifically violates 5 U.S.C.S. Sec. 552a.

8. The threat of future releases of Plaintiff's Social Security number and/or the release of other claimant's Social Security numbers raises a serious and grave threat to Plaintiff's privacy, security, credit, identity, and his well-being, all being rights that should be protected by the Constitution of the United States, the Privacy Act, and the Labor Department as provided in the Statute.

WHEREFORE, plaintiff seeks to have damages for each and every violation, temporary and permanent injunctions to immediately stop this practice as to himself and all other

black lung claimants who have been similarly affected, by all levels of the Labor Department, and further that the Department of Labor provide him with a new Social Security number and an accounting of each and every violation of the Privacy Act it has caused in his case and for such other and further relief as the nature of this case may require. Plaintiff also asks for the cost of having his credit record researched and that Defendant be required to reimburse him on a permanent basis for such repair of his credit record from research by credit agencies.

BUCK DOE

BY COUNSEL

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

ROBERT DOE, Plaintiff	)	
v.	)	
CYNTHIA A. METZLER, ACTING SECRETARY OF DEPARTMENT OF LABOR, Defendant	)	Civil Action No. 97-00043-B

STIPULATION

Plaintiff filed on a "Motion for Temporary Injunction" February 13, 1997 wherein Plaintiff asked the Court for a temporary injunction to prohibit the components of the Department of Labor and its specific divisions that deal with black lung cases from using claimant's Social Security Number on multi-captioned notices of hearings which are mailed to each of the claimants and attorneys for each of the claimants, and to prohibit the Department from the indiscriminate use of the OWCP number incorporating the Plaintiff's Social Security Number.

The parties, herein, stipulate and agree to the following:

1. The Defendant agrees to forthwith stop using the Social Security Number of Plaintiff and the Social Security Numbers of other claimants on multi-captioned, black lung hearing notices and to discontinue the practice of mailing the multi-captioned, black lung hearing notices which bear claimants' Social Security Numbers to the claimants and attorneys listed on said notices.

2. The Defendant further agrees that the employees of the Department of Labor and the specific divisions which

handle the preparation of the notices of hearings in black lung cases will obey the provisions of the Privacy Act. This agreement is not to be construed, however, as an admission by the Defendant that any employee of the Department of Labor or it components or specific divisions violated the provisions of the Privacy Act as alleged by Plaintiff by the use of the multi-captioned black lung hearing notices.

3. Because this stipulation constitutes a complete resolution of the issues raised in Plaintiff's February 13th Motion, and constitutes a resolution of the issues to be presented to the Court during the hearing on the Permanent Injunction set for February 24, 1997, the parties agree that the hearing set for February 24, 1997 should be removed from the Court's docket.

Accordingly, the parties request that the February 24, 1997 hearing be removed from the Court's docket.

/s/	ROBERT P. CROUCH JR.
Joseph E. Wolfe, Esquire	United States Attorney
Counsel for Plaintiff	
/s/	/s/
Jerry W. Kilgore, Esquire	Julie C. Dudley
Counsel for Plaintiff	Assistant United States Attorney
Date: 2/19/97	2/18/97

APPROVED AND SO ORDERED:

/s/
Glen M. Williams
Senior United States District Court Judge

ENTERED: This 20th day of February 1997.

AFFIDAVIT

I, [Buck Doe], of [address], state as follows:

I am a citizen of the Commonwealth of Virginia and the United States of America. I am a retired coal miner, having worked in the mines for 36 years.

In addition to the statements I made in my Complaint (see attached), I want to affirm statements made in my Complaint for myself and also on behalf of other coalminers.

While I am not too well educated, the first thing I noticed about the first hearing was that when I received the notice of hearing it had all the Social Security Numbers and names on the mailing list. I wondered why these were passed out and distributed as they were and if a mistake had been made. I have continued to think about this.

To my knowledge this has now happened to me on each of the hearings, that my name, address, and most important of all my Social Security number has been distributed to scores of other claimants, coal companies, insurance companies, and attorneys.

I am assuming that other individuals like me are greatly concerned and worried about their name, address, and Social Security numbers that are floating around for someone to use. This can cause harm to me and ruin my life and credit and financial future. This harm could be for not only myself, but also for my wife for the rest of her life should I leave this life before her.

I see on the news programs and new magazines almost every month all the people who assume someone's identity and use their Social Security number.

I feel that my privacy has been violated in a way that words cannot describe in that my Social Security number specifically, has been distributed to approximately 55 people that were not suppose to get it. Likewise, it also was distributed before in both of my hearing notices.

I have never given the Department of Labor or any other government agency permission to use my Social Security number to distribute to strangers.

As a retired and disabled coal miner, with over 36 years of work in the mines, I barely make it. I have enough worries just trying to provide for my wife and myself the basic necessities of life such as food, clothing, and shelter. My wife's medicine costs $600 a month. The insurance does not cover all of it. But sometimes it takes 2-3 months to get the money from the insurance company that we paid out for the medicine. A loss of credit caused by the unscrupulous use of my Social Security number or name would be devastating to my wife and myself.

It has torn me all to pieces to realize that my Social Security number has been distributed.

I would like to see this practice stopped not only with the Social Security number but with use of the names.

I feel that due to the long term effect of this invasion of my privacy no amount of money could compensate me for worry and fear of not knowing when someone would use my name and Social Security number to establish credit, a new identity, change my address, use my checking account or even get credit cards.

I have attached a copy of my hearing notices.

DATE: 8-1-97 /s/

[BUCK DOE]

STATE OF VIRGINIA

COUNTY OF WISE, To-Wit:

I, Donna M. Crouse, a Notary Public within and for the county and state aforesaid, do hereby certify that [Buck Doe] whose name is signed to the foregoing Affidavit, bearing date on the 1st day of August, 1997, has this day personally appeared before me and acknowledged the same in my county and state aforesaid.

Given under my hand this the 1st day of August, 1997.

My commission expires: 6/30/98.

/s/
NOTARY PUBLIC

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

ROBERT DOE, aka VIRGINIA PRIVACY LITIGATION, et al.,	)	
Plaintiffs,	)	97-43-B
v.	)	
ALEXIS HERMAN, Acting Secretary of Department of Labor	)	
Defendant.	)	

Wednesday, May 6, 1998
Big Stone Gap, Virginia

The above-entitled matter came on to be heard before the Honorable Glen M. Williams, Judge of the United States District Court, Western District of Virginia, at the Federal Courthouse Building, Big Stone Gap, Virginia, beginning at 10:20 a.m., when there were present on behalf of the respective parties:

APPEARANCES:

For the Plaintiffs:

JOSEPH E. WOLFE, ESQUIRE
ROBERT J. MOTTERN, ESQUIRE
JERRY W. KILGORE , ESQUIRE

For the Defendants:

JULIE C. DUDLEY, ESQUIRE

* * *

Thereupon,

BUCK DOE,

a witness, was called for examination by counsel and after having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KILGORE:

Q For the record, you have filed an action in this case against the Department of Labor for violation of your privacy rights using the name Buck Doe; is that correct.

A Right.

Q Have you previously filed for black lung benefits?

A I got it for about two years.

Q When was that?

A I'm not sure, but I'm thinking it was around '92 because I retired in '91.

Q How long have you worked in the mines?

A Thirty-six years.

Q You retired and you filed for black lung benefits; correct?

A I filed when we was on strike. I forget. Seems like it was around '90.

Q Probably '89?

A Could be, but anyway, I worked. We was on strike and I went back after the strike and tried to work about another year so I could get me a decent retirement.

Every little bit helps, but anyway, I drawed it for about two years. It seems like it was around '92.

Q Did there come a time when you stopped drawing?

A Yes, sir. They took it. They appealed. I drawed two years, maybe a little over two years, and then they took it.

Q Did you re-file for benefits?

A Yeah.

Q Did you then have a scheduled hearing for your benefits?

A Yeah.

Q Do you remember when your last hearing was scheduled for?

A It was a year ago this past February, the 18th day of February I believe.

Q So, that would be in February of 1996; correct?

A Six or seven. In other words, it was a year ago this past February.

Q Okay. I am going to approach you with what has previously been marked as Claimants' Exhibit Number 2 and ask if you have seen Claimants' Exhibit Number 2 before.

A You are talking about this?

Q Right, if you have received this.

A Oh, yes. Yes, sir.

Q That Claimants' Exhibit Number 2 basically is your notice of your hearing; correct?

A Yeah, uh-huh.

Q On those notice of hearings, does it have your name on it?

A Yeah.

Q Does it have your Social Security number on it?

A This one don't. Yeah, it does, too, right here. I'm sorry.

Q Does it have the names and Social Security numbers of a lot of other individuals on it?

A Yeah.

MR. KILGORE: If I could move the introduction of Claimants' Exhibit Number 2.

THE COURT: Very well. Introduced as Claimants' Exhibit 2.

BY MR. KILGORE:

Q When you got this notice, Buck, and I will call you Buck so it is not confusing, because everyone's name is Doe in this case.

When you got this, Buck, did you realize that every individual was receiving your Social Security number and the information, your address?

A Well, I don't have much education, but I did wonder why everybody was.

Q What is your educational background?

A I went to the sixth grade.

Q Have you read the Privacy Act in the United States Code?

A No.

Q Are you concerned, however, that your Social Security number was released to other individuals?

A Well, like I say, I don't have no education, but it did seem odd.

Q It seemed odd that your Social Security number was being—

A Everybody was on there.

Q What concerns, if any, do you have about your Social Security number being released?

A Well, I've heard of cases of people's Social Security number being used, but mine has not been used that I know of, but I have heard of cases where they have been, where people has got them and used them.

Q Do you worry about your number being used?

A Well, it bothered me, yeah.

Q On other matters, on your—do you have a checking account?

A I might have a few dollars. I don't know.

Q Do you have—I don't want you to tell me how much is in your checking account, but do you have information on your checks?

A No, really I don't. I'll tell you why. I have had a little money, you know, since I got out of Service, a little checking account. I don't write no checks, my wife does.

Q So, she has an account.

A Well, my name is on it, but I don't write no checks.

Q On those checking accounts or any other accounts that you may have, whether they be credit cards or other things, you choose, you would choose what information to provide to each one of those individuals; correct?

A Yeah.

Q If they ask for your Social Security number, you could make that determination?

A [Nodding head.]

Q In applying for black lung benefits, Buck, did the Department of Labor inform you that they were going to mail your Social Security number to individuals not involved in your case?

A No.

Q Did they inform you of any other release that they were going to make of your Social Security number?

A No.

Q Did you have any idea that they were going to mass mail your Social Security number to a host of individuals not involved in your particular action?

A No.

Q Do you object to those uses of your Social Security number?

A Would you repeat that again?

Q Do you object to those uses, to the Department using your Social Security number in those matters?

A I don't think no one should have nobody else's Social Security myself.

Q So, you object to those uses?

A Yes.

MR. KILGORE: All right. Thank you.

Answer the questions that Ms. Dudley might have.

CROSS-EXAMINATION

BY MS. DUDLEY:

Q Good morning, Buck.

A Good morning.

Q Buck, what information is on your checks.

A Well, this will probably be hard for you to believe and the Court to believe, I don't write no checks. I know our address is on it.

Q Your home address?

A Me and my wife's.

Q Okay. How about your phone number?

A I couldn't be—I couldn't tell you for sure to tell you the truth.

Q Is it a joint checking account such that your name and your wife's name is on it?

A Me and my wife.

Q Are you testifying that you just haven't looked at those checks in a long time so you couldn't possibly be able to say what information is on them?

A Can you repeat that, please?

Q Do you know positively whether or not the Social Security number and your wife's appears on those?

A I don't know but probably it is. To say yes or no, I don't know because I don't write no checks. I don't carry a check, don't have no credit cards.

Q Is your wife here in the courtroom with you?

A Ma'am?

Q Is your wife here in the courtroom?

A No, no.

Q So, you don't have a spare check on you?

A No.

Q Do you have a Virginia driver's license?

A [Nodding head]

Q What is the identifying number on your driver's license?

A You want the number?

Q Is it your Social Security number or another number?

A No.

Q When did you get that license?

A I would say about two months ago.

Q Why did you get that license?

A Well, like I say, I had heard of people's Social Security numbers being abused and I head that you could get it took off of your driver's license and that is when I did it. I believe I did it.

Q Two months ago you had your Social Security number as your driver's license number?

A Yes, ma'am.

Q Until two months ago, have you ever had anyone to use your Social Security number for anything?

A No, ma'am.

Q You testified, let me see if I can clear this up. First you said that you wondered why the Department of Labor was sending out your Social Security number along with every one of the others, but it didn't really bother you?

A Well, it bothered me, but like I say, I don't have no education for anything like that, but I understand a lot of stuff, but it bothered me the first time I seen it and everybody else's on it.

Q Did you talk to anyone about the fact that your Social Security number was going out and you had seen other people's Social Security numbers?

A Well, I talked to a few people that has had hearings. We would talk about it.

Q Did you ever complain to the Department of Labor, for instance, the Administrative Law Judge, that your Social Security number was on these hearing notices that they sent out?

A No.

Q Is that because it bothered you but it wasn't really something you were that concerned about?

A Well, when I seen it, it bothered me. The first hearing I had, that is when I noticed it and me and my wife talked about why should everybody's Social Security number and address, why didn't they send them out separately instead of putting a whole bunch of names on there with your Social Security and your address.

Q But you didn't complain to the Department of Labor?

A No.

Q And ask them about it?

A No, ma'am.

Q Did you fill out the application for benefits?

A No, ma'am.

Q Who filled it out for you?

A It was some lady that worked for the Department of Labor or the state or somebody. I don't know. She was a Gilliam lady, had an office in Wise, Virginia.

Q Okay. You applied twice; is that right?

You filed two claims or how many claims?

A Well, when I first applied was the first time. Then they took it later. I drawed a couple of years, maybe longer. Then I had to appeal or whatever to reapply. In December, last December, a letter, I got a letter saying they was giving it back to me, but I have not got nothing out of it. They say I owe them back pay.

Q Oh, goodness. They took back—

A It don't make sense, but—

Q Yeah. You filled out two separate application; is that right?

A Yes, ma'am.

Q All right. Did the person who helped you fill it out, did they read to you the Privacy Act notice on the other page?

A Did they read it to me?

Q Uh-huh.

A No.

Q Do you remember it being read to you?

A No, ma'am.

Q Do you read at all? Did they cast you in a corner to look over it or anything like that?

A Well, I can read a little, you know. I mean a lot of things that—something simple, I can read, very simple. I'll put it that way.

Q Do you remember reading over the form, the application form?

A No, ma'am. Like I say, the lady filled them out. I answered the questions she asked me and that was it.

MS. DUDLEY: Okay. That is all I have, Your Honor.

THE COURT: All right.

REDIRECT EXAMINATION

BY MR. KILGORE:

Q Buck, up until recently, did you have any idea that there was a law that controlled the information that the Department of Labor could actually release about you?

A No, I didn't know.

Q Did you want everyone in your community or everyone—did you want anyone else to know that you had applied for black lung benefits?

A Well, not really because it wasn't, you know, nobody's business really but me and my doctor's. He said it was important, he wanted it put in.

Q So, you wanted those that that were involved in your case to know?

A Yeah.

Q But no one else?

A Right.

Q If you wanted to pursue this case on your own, do you have the resources to hire your own attorney to pursue it on your own?

A I can't even go out, me and my wife and have a good meal.

MR. KILGORE: I have nothing else. Thank you.

RE-CROSS EXAMINATION

BY MS. DUDLEY:

Q Mr. Doe, Mr. Buck, I will call you Buck. Buck, when you got the first award of black lung benefits, did you talk about it?

Did you tell your other family members, your buddies, close friends?

A I'm sorry. You will have to repeat that, please.

Q When you got your first award of benefits, did you talk about receiving the money?

A Well, I did in my family.

Q How about the people you worked with?

A Well, maybe one other fellow.

Q I'm sorry?

A Maybe one other fellow that received black lung. I think I told him.

Q Okay. All right. Mr. Buck Doe, how did you find out about the Privacy Act other than it was on your form you filled out initially?

A Well, several years ago there was something mentioned on it. I watch C-Span a lot.

Q Uh-huh.

A If anybody was watching here today, they was watching last Wednesday, that was on C-Span. Paul, Senator Paul or Representative Pauls, that is his last name, out of Texas, he was talking about it.

Q The Privacy Act?

A Yes, ma'am. It was last Wednesday.

Q Before you filed suit, when did you find out about—

A Ma'am?

Q Before you filed this suit that you are involved in, how did you find out about the Privacy Act?

A Well, I mean, I have just heard people talk about it is all. Just discussed it with different people.

Q What specifically did they discuss?

A Ma'am?

Q What did they discuss?

A Well, it was the Privacy Act, everybody is not supposed to have your Social Security number.

Q Was it discussed among other people that are here in the courtroom today, the other members of this suit?

A Well, no, no. I discussed it with my lawyer.

Q Mr. Wolfe?

A Mr. Wolfe.

Q Mr. Wolfe—who represented you the first time you applied for benefits?

A Vernon Williams, the gentleman right over here.

Q All right. He is associated with Mr. Wolfe?

A Yes, ma'am.

Q All right. You didn't raise any complaint the first time you filled out benefits, about your Social Security number being on it?

A Ma'am?

Q You didn't raise any complaint or voice any complaint to Mr. Williams about your Social Security number being—

A No, ma'am.

MS. DUDLEY: All right.

MR. KILGORE: Your Honor, if I could ask one question from here.

THE COURT: That's fine.

MR. KILGORE: Buck, were you reluctant to complain about the use of your Social Security number at the same time you were applying for benefits?

THE WITNESS: Well, like I say, like I stated a while ago, I knowed it wasn't right for everybody's name to be on

there, but I didn't know how to go about it or what, but I did know that everybody's names and Social Security being put on there and so many different people getting it through the mail.

MR. KILGORE: All right. Thank you. I have no further questions, and he can be excused.

THE COURT: All right, Buck, you can be excused.

MR. WOLFE: I want to call Raymond. I want to call, I'm sorry, let's see, R.A. Doe or Raymond Doe.

MR. KILGORE: R.A. Doe.

MR. WOLFE: R.A. Doe. He has stepped out on me.

Okay. Let me call Dallas Doe.

Supreme Court, U.S.
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No. 02-1377

IN THE

Supreme Court of the United States

BUCK DOE,

Petitioner,

v.

ELAINE L. CHAO, SECRETARY OF LABOR,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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QUESTION PRESENTED

Whether an individual to whom the United States "shall be liable" for an "adverse effect" suffered as a result of a federal agency's "intentional or willful" violation of the Privacy Act, 5 U.S.C. § 552a *et seq.*, must prove that he suffered "actual damages" to be entitled to the statutory damages award of $1,000 available under Section 552a(g)(4) of the Act.

PARTIES TO THE PROCEEDINGS

The Petitioner is Buck Doe. The Respondent is the United States Department of Labor. Robert Doe, Tays Doe, Otis Doe, Thomas Doe, Joe Doe, Dick Doe, and Charles Doe were parties to the proceedings below.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-60a) is reported at 306 F.3d 170. The opinion of the district court (Pet. App. 61a-68a) and the report and recommendation of the magistrate judge (Pet. App. 69a-104a) are unreported.

JURISDICTION

The court of appeals entered its judgment on September 20, 2002, and denied petitioner's motion for rehearing and suggestion of rehearing *en banc* on November 15, 2002. Pet. App. 1a-2a. On January 23, 2003, Chief Justice Rehnquist, as Circuit Justice for the Fourth Circuit, granted Petitioner's motion for extension of time in which to file a petition for a writ of certiorari up to and including March 15, 2003. The petition for a writ of certiorari was filed on March 14, 2003, and granted on June 27, 2003. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Privacy Act, 5 U.S.C. § 552a *et seq.*, are reprinted at Pet. App. 105a-106a.

STATEMENT

The Privacy Act of 1974 protects individuals' "personal and fundamental right" of privacy by "regulat[ing] the collection, maintenance, use, and dissemination of information by [federal] agencies." Pub. L. No. 93-579 §§ 2(a)(4), 2(a)(5), 88 Stat. 1896.[1] The Act stemmed from Congress's prescient concern that federal agencies' "increasing use of computers and sophisticated information technology . . . has greatly magnified the harm to individual privacy that can occur from any collection, maintenance, use or dissemination of personal

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[1] Several enacted provisions of the Privacy Act (§§ 2, 5, 6, and 7) were not separately codified in the United States Code.

information." *Id.* § 2(a)(2). Congress was especially troubled by federal agencies' routine use and disclosure of social security numbers (*id.* § 7), which it described as "one of the most serious manifestations of privacy concerns in the Nation." S. Rep. No. 93-1183, at 28 (1974), *reprinted in* Comm. on Gov't Operations U.S. Senate and Comm. on Gov't Operations House of Representatives, *Legislative History of the Privacy Act of 1974 S. 3418 (Public Law 93-579) Source Book on Privacy* at 181 (1976) [hereinafter "*Source Book*"].

Petitioner, a black-lung benefit claimant, brought suit under the Privacy Act after the Department of Labor ("Department") – pursuant to long-standing Department policy – used his social security number as a claim identifier and widely disseminated the number in hearing notices. Petitioner's harm was the one most typically suffered as a result of a privacy invasion – emotional distress, here compounded by a well-founded fear that the disclosure could lead to someone assuming Petitioner's identity. The issue in this case is whether proof of such harm, which unquestionably constitutes an "adverse effect" under Section 552a(g)(1)(D) of the Act, along with the other required elements of a cause of action, allows recovery of the $1,000 statutory damages provided for under Section 552a(g)(4)(A), or whether additional proof of some measure of "actual damages" conditions such an award.

1. Statutory And Regulatory Background

The Privacy Act prohibits federal agencies from "disclos[ing] any record which is contained in a system of records by any means of communications to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains . . . ." 5 U.S.C. § 552a(b). The Act also affords individuals a right to review and, where appropriate, demand amendment of, agency records that are inaccurate or incomplete. *Id.* § 552a(d)(1)-(3). The Act further regulates

the manner by which an agency may collect and maintain information about individuals. *Id.* § 552a(e).

The Act "safeguards . . . an individual against an invasion of personal privacy" by, among other things, making federal agencies "subject to suit for any damages which occur as a result of willful or intentional action which violates any individual's rights under th[e] Act." *Id.* § 2(b)(6). Congress intended this private right of action to "encourage the widest possible citizen enforcement through the judicial process." S. Rep. No. 93-1183, at 83, *reprinted in Source Book* at 236; *see also* H.R. Rep. No. 93-1416, at 15 (1974), *reprinted in Source Book* at 308 ("best means" to enforce the Act is "constant vigilance of individual citizens backed by legal redress").

Section 552a(g) sets forth the Act's civil remedies. Section 552a(g)(1)(D) – the provision under which Petitioner brought suit – provides a cause of action for, among other things, wrongful disclosures of information:

> Whenever any agency . . . fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual, the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

Section 552a(g)(4) further provides:

> In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of —
>
> (A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a

person entitled to recovery receive less than the sum of $1,000; and

(B) the costs of the action together with reasonable attorneys fees as determined by the court.

5 U.S.C. § 552a(g)(4).[2]

The Act's legislative history describes Section 552a(g)(4)(A)'s $1,000 statutory damages clause as "liquidated damages . . . [to be] assessed against the agency for a violation of the Act." *Source Book* at 768 (report of Senate "technical and substantive committee amendments"); *see also* H.R. Rep. No. 93-1416, at 38, *reprinted in Source Book* at 330 (pre-amendment view of various House members that the Act should "at the very least" contain a "liquidated damages" provision).

The Privacy Act tasked the Office of Management and Budget ("OMB") to "develop guidelines and regulations for the use of agencies in implementing the provisions of [the Act]." Pub. L. No. 93-579 § 6 (current version codified at 5 U.S.C. § 552a(v)). Pursuant to that authority, OMB promulgated the Privacy Act Guidelines in July 1975, only seven months after the Act's effective date. The Guidelines construe Section 552a(g)(4) to mean:

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[2] Sections 552a(g)(1)(A) and (g)(1)(B) allow suits for injunctive relief, but not damages, where an agency fails to amend an inaccurate record or fails to provide access to records, respectively. *See* 5 U.S.C. §§ 552a(g)(1)(A), (g)(1)(B), (g)(2), and (g)(3). Section 552a(g)(1)(C) allows suits for damages where an agency maintains an inaccurate record that forms the basis of an "adverse" determination "relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record." *See id.* § 552a(g)(1)(C). The United States' liability in Section 552a(g)(1)(C) "adverse determination" actions is, as in Section 552a(g)(1)(D) actions, measured by Section 552a(g)(4). Injunctive relief is not available in actions brought under Sections 552a(g)(1)(C) and (D).

When the court finds that an agency has acted willfully or intentionally in violation of the Act in such a manner as to have an adverse effect upon the individual, the United States will be required to pay

– actual damages or $1,000, whichever is greater

– court costs and attorney fees.

40 Fed. Reg. 28,948, 28,970 (1975).

2. Factual Background And Proceedings Below

The Department of Labor administers claims brought pursuant to the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq*. Pet. App. 5a. For years, the Department's application form asked claimants to provide their social security numbers, which the Department used as claim identifiers. *Id.* Administrative law judges ("ALJs") routinely distributed hearing notices identifying multiple black-lung claims by name and social security number. *Id.* ALJs also routinely captioned benefits decisions with claimants' names and social security numbers and released them for publication. As a result, claimants' social security numbers were widely disclosed. Pet. App. 5a-6a. The existence and operation of the Department's policies and practices are undisputed. Pet. App. 63a, 70a-71a, 82a.

In February 1997, Petitioner and several other black-lung benefit claimants brought Section 552a(g)(1)(D) Privacy Act suits against the Department in the United States District Court for the Western District of Virginia. They alleged that the Department had failed to comply with the Act by routinely disclosing social security numbers. Each claimant sought $1,000 statutory damages under Section 552a(g)(4)(A). Pet. App. 5a-6a, 82a-83a. Petitioner attested (by affidavit and by sworn testimony) that the disclosure caused him significant emotional distress, specifically fear that someone would

fraudulently use his name and social security number. Pet. App. 75a-76a; JA 14-15, 20-21, 24, 28-29.

Immediately after Petitioner filed his suit, the Department consented to an order barring further disclosures of black-lung claimants' social security numbers on hearing notices or other documents. Pet. App. 5a-6a, 82a-83a; JA 12-13.

On the parties' cross-motions for summary judgment, the magistrate judge concluded: (i) social security numbers are "records" held by the Department in a "system of records" under the Privacy Act, Pet. App. 86a; (ii) Doe did not consent to the Department's disclosure of his social security number, Pet. App. 87a-88a; (iii) no exception to the Privacy Act's restrictions excused the Department's disclosure, Pet. App. 88a-92a; (iv) as a result of the disclosure, Doe suffered the "adverse effect" of emotional distress, Pet. App. 93a-94a; (v) "undisputed evidence" proved the Department's violation of the Act was "intentional and willful," Pet. App. 96a-97a; and (vi) Doe's evidence of emotional harm could trigger at least "the statutory damages provided for in the Act" and, thus, the Department was not entitled to summary judgment. Pet. App. 99a-100a.[3]

The district court accepted the magistrate's report in part and rejected it in part. Pet. App. 61a-62a. It held that Doe had proven the "elements essential to prevail on a claim for damages under the Privacy Act." Pet. App. 66a. It further held that Doe's "incontrovertible evidence" of "emotional distress as a result of the Department disclosing his social

[3] The magistrate judge recommended summary judgment for the Department on the other plaintiffs' claims because none had produced any evidence of adverse effect. Pet. App. 100a. The magistrate judge also recommended denial of a motion to certify a class of black-lung claimants. Pet. App. 79a-81a. The district court accepted these recommendations, Pet. App. 61a-62a, and the Fourth Circuit affirmed. Pet. App. 21a-23a. These issues are not before this Court.

security number to parties not specifically involved in his black lung claim" was sufficient to "allow[] granting summary judgment in his favor" for the "statutory minimum amount of $1,000 . . . provided by 5 U.S.C. § 552a(g)(4)(A) . . . ." Pet. App. 66a-67a.

A split panel of the Fourth Circuit reversed, framing the issue as "whether a person must suffer 'actual damages' in order to be considered 'a person entitled to recovery' within the meaning of section 552a(g)(4)(A), and therefore entitled to the statutory minimum of $1,000 under that section." Pet. App. 9a. The court of appeals held that "a person must sustain actual damages to be entitled to the statutory minimum damages award." *Id.*

The court of appeals' decision rested on rationales it deemed convincing in the "aggregate." Pet. App. 9a. The court opined that Section 552a(g)(4)(A)'s juxtaposition of the phrases "person entitled to recovery" and "actual damages" suggested that the provision "indirectly" defines "'recovery' . . . by its express limitation of the Government's liability to actual damages sustained." Pet. 9a-10a. It also believed that Congress "could have phrased the liability provision to provide unequivocally for a statutory minimum recovery, even for those who are unable to prove actual damages." Pet. App. 11a. The court of appeals conceded that its interpretation was "not strictly compelled by the statute's language." Pet. App. 13a. It reasoned, however, that because the Privacy Act is a "limited waiver of sovereign immunity," Section 552a(g)(4)(A) must be "strictly construed." Pet. App. 13a-14a.

The court of appeals then held that Doe's emotional harm, though an "adverse effect," was not quantifiable as "actual damages." It therefore reversed the district court and remanded with instructions to enter summary judgment for the Department. Pet. App. 14a-18a.

Judge Michael dissented. He would have held that an individual like Petitioner who proves an "adverse effect" caused by an agency's "willful or intentional" disclosure of private information can recover $1,000 statutory damages under Section 552a(g)(4)(A) without proving some measure of "actual damages." Pet. App. 25a. He noted that the Act expressly states, in language preceding Section 552a(g)(4)(A), that the United States "shall be liable" to an individual who demonstrates an "adverse effect" caused by an "intentional or willful" violation of the Act. Pet. App. 31a-32a & n.4. Thus, "the phrase 'person entitled to recovery' is more naturally read to mean anyone to whom 'the United States shall be liable . . . .'" Pet. App. 30a. Moreover, "[a]s a matter of ordinary language usage, an entitlement to 'recovery' is surely broader than an entitlement to actual damages." Pet. App. 31a.

Judge Michael buttressed his interpretation with four additional arguments. *First*, "most circuit courts have read the Privacy Act to allow recovery of statutory damages without proof of actual damages." Pet. App. 33a. *Second*, the interpretation is "consistent with" OMB's Privacy Act Guidelines, which are "due the deference accorded to the interpretation of an agency charged with oversight of implementation." Pet. App. 35a (internal quotation marks omitted). *Third*, the interpretation conforms with that given other statutory damages provisions similar in language, structure, and purpose to Section 552a(g)(4). Pet. App. 35a-39a. *Fourth*, the interpretation fulfills the Privacy Act's remedial and deterrent purposes. Without a statutory damages remedy available in the absence of "actual damages," few individuals would have incentive to sue given that damages arising from a privacy invasion "can be hard to quantify . . . because the typical injury caused . . . is mental distress." Pet. App. 50a, 52a, 59a.

Finally, Judge Michael "doubt[ed]" the majority's application of a sovereign-immunity-based narrowing

construction where the question is "what a plaintiff must prove to obtain relief that has been unequivocally authorized" and not "whether a lawsuit may be brought at all or about the availability of certain forms of relief." Pet. App. 46a & n.10. In any event, Judge Michael reasoned, the scales "decisively tip" in favor of his interpretation. Pet. App. 46a-47a.

SUMMARY OF ARGUMENT

Section 552a(g)(4) of the Privacy Act awards $1,000 statutory damages to any individual who has proven an "adverse effect" caused by a federal agency's "intentional or willful" failure to comply with the Act. The Act does not deny a remedy to those individuals whose rights under the Act have been violated, and who have suffered real harm in the form of an "adverse effect," but who cannot quantify, or choose not to seek, "actual damages." The Act's plain text, structure, context, purpose, and relevant administrative guidance compel this interpretation.

1. The Privacy Act's language, structure, and context make plain that the phrase "person entitled to recovery" in Section 552a(g)(4)(A) describes those individuals to whom "the United States shall be liable" – *i.e.*, those who have proven an "adverse effect" caused by an "intentional or willful" violation of the Act. In "no case" are these individuals entitled to receive "less than the sum of $1,000," even if they have not quantified "actual damages."

a. The Privacy Act mandates that "the United States shall be liable" to an individual who establishes: (i) an "adverse effect"; (ii) an agency's failure to comply with the Act caused the "adverse effect"; and (iii) the failure to comply was "intentional and willful." These elements are thus necessary and sufficient to establish the United States' liability. Sections 552a(g)(4)(A) and (B) provide the measure of that mandatory liability – at a minimum "an amount equal to the sum of" $1,000 statutory damages, costs, and attorneys' fees. They do

not set forth additional elements required to establish the United States' liability *vel non*. If, as the court below held, proof of "actual damages" is to be read as a claim element, and not simply one measure of established liability, the result would (i) subvert the Act's plain meaning by rendering its mandatory liability language merely permissive, and (ii) render the Act's "adverse effect" requirement superfluous.

b. Section 552a(g)(4)(A)'s text and structure confirm that a $1,000 damages award does not require proof of "actual damages." The independent statutory damages clause uses the phrase "person entitled to recovery" to describe those individuals who are entitled to $1,000 statutory damages. An entitlement to "recovery" has a different, and far broader, meaning than an entitlement to "actual damages." It specifically encompasses damages awards that do not require a claimant to quantify "actual damages." Thus, "person entitled to recovery" must describe the broader class of individuals to whom the United States "shall be liable"– *i.e.*, those whose "adverse effect" is to be remedied by $1,000 statutory damages. It cannot be limited to the narrow class of individuals who suffer harm quantifiable as "actual damages." Section 552a(g)(4)(A)'s grammatical structure points to the same result. The two damages clauses are joined by the adversative conjunction "but," thereby identifying the second, statutory damages clause as independent of, and in contrast to, the first, actual damages clause.

c. Petitioner's interpretation of the Act avoids absurd, and potentially unconstitutional, results. It satisfies the usual rule that attorneys' fees extend only to a prevailing party. Proof of an "adverse effect" caused by an agency's "intentional or willful" violation merits at least a $1,000 statutory damages, a success that triggers a concomitant attorneys' fees award. The court below's interpretation, however, suggests that an individual who cannot quantify "actual damages" may nonetheless recover attorneys' fees. An attorneys' fees award

unaccompanied by any remedial award would be anomalous and would raise a constitutional problem. If an individual may plead a Privacy Act cause of action in which the only possible relief is attorneys' fees, then the Act would allow a suit even where there is no Article III case or controversy.

d. Three times since Congress enacted the Privacy Act, it has employed language identical in all material respects to Section 552a(g)(4) in privacy-protection statutes. Each time, Congress intended to create a statutory damages remedy that does not depend on proof of actual damages. This repetition confirms that Congress understood and intended Section 552a(g)(4) to do so as well.

e. Any sovereign immunity based departure from the interpretation compelled by the Privacy Act's plain language, structure, and context would be improper. The sovereign immunity canon of construction does not mean that an explicit waiver, like that in the Act, should be given an implausible reading. Moreover, this canon applies only to the questions of (i) whether the government has waived its right to be sued, and (ii) whether the government has waived its right to be subject to a given remedy. Subsidiary questions concerning a statute's operation and administration – in this case, the type of proof necessary to recover monetary relief under the Act – are not ones to which the sovereign immunity canon applies.

2. The Privacy Act's serves two goals: (1) to remedy harm typically suffered as a result of a violation, not just that quantifiable as "actual damages"; and (2) to deter federal agencies from violating the Act's privacy protections. The Act's civil remedies provision serves these goals when it awards $1,000 statutory damages to an individual who proves an "adverse effect" caused by an "intentional or willful" violation.

a. The emotional distress "adverse effect" that results from a privacy invasion is real and, as in all types of privacy invasion claims, often the only harm suffered. Such harm is inherently difficult to quantify for purposes of establishing "actual damages." Therefore, a statutory damages remedy that stands independent of any provable "actual damages" extends the Act's reach to all those Congress intended to protect. This in turn ensures that robust civil enforcement will deter future agency violations of the Act.

b. The Act's legislative history describes Congress' careful crafting of a provision that serves the Act's remedial and deterrent goals, yet mitigates the risk of excessive liability. The Senate's desire for a "liquidated damages" provision to remedy difficult-to-quantify harms and encourage widespread citizen enforcement (a desire shared by a number of House members as well) was addressed by the $1,000 statutory damages provision. The House's countervailing desire to limit the United States' liability was addressed by the strict "intentional and willful" culpability standard and by capping statutory damages at $1,000.

c. The Privacy Act's civil remedies provision also parallels common-law remedies for intentional torts generally, and privacy torts specifically. In such actions, some damages (even if nominal) are awarded to vindicate the legally protected interest itself, to remedy difficult-to-quantify harms, and to encourage suits to vindicate the protected interest. Properly interpreted, the Privacy Act conforms with these analogous tort remedies, which serve the same purposes Congress intended the Act to serve.

d. Congress tasked OMB to develop guidelines and regulations that would direct agencies' implementation of the Privacy Act. OMB's comprehensive Privacy Act Guidelines interpret Section 552a(g)(4) to create $1,000 statutory damages award that does not require proof of "actual damages." OMB's contemporaneous, longstanding interpretation is

entitled to great respect, and confirms the result compelled by the Act's text, structure, context, and purpose.

ARGUMENT

I. THE PRIVACY ACT AWARDS $1,000 STATUTORY DAMAGES TO ANY INDIVIDUAL WHO HAS PROVEN AN "ADVERSE EFFECT" CAUSED BY AN "INTENTIONAL OR WILLFUL" VIOLATION OF THE ACT

Every touchstone of textual interpretation – "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole" (*Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)) – leads to the same result in this case. The Privacy Act awards $1,000 statutory damages to any individual who proves an "adverse effect" caused by a federal agency's "intentional or willful" failure to comply with the Act. In "no case" does the Act deny a remedy to those individuals whose rights under the Act have been violated and who have suffered real harm in the form of an "adverse effect," but who cannot quantify, or choose not to seek, "actual damages." This interpretation flows from the Act's plain text and structure, gives meaning and consistency to each aspect of the Act's civil remedies provision, and avoids absurd and potentially unconstitutional results.

A. The Privacy Act's Plain Language, Structure, And Context Establish That $1,000 Statutory Damages Are Not Contingent Upon Proof Of Actual Damages

The Privacy Act's civil remedies provision, properly read as a whole, does not condition an award of $1,000 statutory damages on an individual's quantifying "actual damages." The provision first defines who may bring a Privacy Act claim – an "individual." 5 U.S.C. § 552a(g)(1). It then defines the circumstances under which "the United States shall be liable" to that individual: (i) the individual suffered an "adverse effect"; (ii) an agency's "fail[ure] to comply with any other

provision of this section, or any rule promulgated thereunder" caused the adverse effect; and (iii) the agency's failure to comply was "intentional or willful." 5 U.S.C. §§ 552a(g)(1)(D), (g)(4). Hence, the Act unambiguously designates these elements as necessary and sufficient to establish the United States' liability. *Black's Law Dictionary* 915 (6th ed. 1990) ("liable" means "[b]ound or obliged in law or equity; responsible, answerable, compellable to make satisfaction, compensation, or restitution"); *The Oxford English Dictionary* 878 (2d ed. 1989) ("liable" means "[b]ound or obliged by law or equity, or in accordance with a rule or convention; answerable . . . ; legally subject or amenable to").

Section 552a(g)(4)'s use of the mandatory "shall" leaves no room for courts to require an individual to prove any additional element as a prerequisite to establishing the United States' liability. *See, e.g., National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109 (2002) ("shall" is "mandatory"); *Miller v. French*, 530 U.S. 327, 337 (2000) ("shall" is a "mandatory term"); *United States v. Monsanto*, 491 U.S. 600, 607 (1989) ("Congress could not have chosen [a] stronger word[]" than "shall" "to express its intent that [an action] be mandatory"). Nor can there be any argument that Section 552a(g)(4) uses "shall" as a synonym for "may." Where the Privacy Act makes the United States' liability permissive, and not mandatory, it uses the word "may." *See* 5 U.S.C. § 552a(g)(2)(A) (court "may order the agency to amend the individual's record"); *id.* §§ 552a(g)(2)(B), g(3)(B) (court "may assess against the United States reasonable attorney fees"); *id.* § 552a(g)(3)(A) (court "may enjoin the agency from withholding . . . records"). When a statute "uses both 'may' and 'shall', the normal inference is that each is used in its usual sense – the one . . . being permissive, the other mandatory." *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947).

Once an individual establishes the United States' mandatory liability, Sections 552a(g)(4)(A) and (B) on their face provide the *measure* of that liability – at a minimum "an amount equal to the sum of" $1,000 statutory damages (5 U.S.C. § 552a(g)(4)(A)), costs, and attorneys' fees (*id.* § 552a(g)(4)(B)). These provisions do not set forth additional elements required to establish liability *vel non*. Certainly, an individual who can quantify "actual damages" over and above the demonstrated "adverse effect" may recover them. But Section 552a(g)(4)(A) does not condition the United States' liability on such proof. *See Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that words of a statute must be read in their context and with a view to their place in the overall statutory scheme.").

Section 552a(g)(4)(A)'s text and structure likewise make clear that the Act's $1,000 statutory damages remedy stands independent of proof of "actual damages." Section 552a(g)(4)(A) contains two independent clauses. The second, statutory damages clause uses the phrase "person entitled to recovery" to describe those individuals who "in no case shall . . . receive less than the sum of $1,000." It does not limit the entitlement in terms of "actual damages," as does the preceding clause of Section 552a(g)(4)(A). Where Congress "uses certain language in one part of the statute and different language in another, the [C]ourt assumes different meanings were intended." 2A N. Singer, *Sutherland on Statutory Construction* § 46.06 (6th ed. 2000); *see Russello v. United States*, 464 U.S. 16, 23 (1983).

An entitlement to "recovery" has a different, and far broader, meaning than an entitlement to quantifiable "actual damages." This Court has held that questions concerning the proper measure of damages are "no longer confused with a right of recovery" where "a wrong has been done." *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S.

555, 565-66 (1931). The Court also has described an individual as "entitled" to "recover" or to "recovery" when discussing nominal damages awards, which are not contingent upon proof of any actual damages, and attorneys' fees awards. *See, e.g., Carey v. Piphus*, 435 U.S. 247, 267 (1978) (nominal damages); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 283 (1975) (Marshall, J., dissenting) (attorneys' fees); *Keystone Mfg. Co. v. Adams*, 151 U.S. 139, 147 (1894) (nominal damages).[4] Thus, the term "person entitled to recovery" in Section 552a(g)(4)(A)'s second clause must describe the broader class of individuals to whom the United States "shall be liable" – *i.e.*, those whose "adverse effect" is to be remedied by $1,000 statutory damages and concomitant attorneys' fees. It cannot be limited to the more narrow class of individuals who suffer harm quantifiable as "actual damages."

Section 552a(g)(4)(A)'s structure confirms this interpretation. When two independent clauses are joined by the adversative conjunction "but," as they are here, the second clause "[i]ntroduc[es] a statement of the nature of an exception, objection, limitation, or contrast to what has gone before." *Oxford English Dictionary* at 704; *accord Fowler's Modern English Usage* 120-21 (3d ed. 1996); *cf. Webster's Third New Int'l Dictionary* 303 (unabridged ed. 1976) ("adversative" terms are "expressive or indicative of antithesis, opposition, adverse circumstance, reservation, or contrary

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[4] Common legal definitions of "recovery" are similarly broad. *See, e.g., Black's Law Dictionary* at 1276 ("[t]he obtaining of a thing by the judgment of a court, as the result of an action brought for that purpose"); W. Anderson, *A Dictionary of Law* 865 (1889) ("[t]he actual possession of anything, or its value, by judgment of a legal tribunal"); S. Gifis, *Dictionary of Legal Terms* 369 (2d ed. 1993) ("the establishment of a right by the judgment of a court"); *Oxford English Dictionary* at 1367 (in law, "[t]o get back or gain by judgement in a court of law; to obtain possession of, or a right to, by legal process").

suggestion"). Thus, the Act expressly designates the second, statutory damages clause of Section 552a(g)(4)(A) as independent of, and in contrast to, the first, actual damages clause.

If Section 552a(g)(4)(A) is instead read, as it was by the court below, to make an actual damages showing a necessary claim element – and not simply one measure of the United States' liability – the result would "subvert the plain meaning of the statute" by "making its mandatory language merely permissive." *Miller*, 530 U.S. at 337. Proof of an "adverse effect" caused by an "intentional or willful" violation of the Act would not mean that "the United States shall be liable." Rather, proof of these elements would mean only that the United States "may" be liable, and then only if the individual further proves that he suffered some "actual damages."

Furthermore, in that event, Section 552a(g)(1)(D)'s "adverse effect" requirement would become superfluous, since it would be insufficient to support a conclusion of liability and an individual's claim necessarily would depend upon the further showing of "actual damages." Of course, a "statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant," and the Court therefore has "the duty to give effect, if possible, to every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks and citation omitted).

It is inconceivable that Congress would permit an individual who has suffered an "adverse effect" to bring a claim under the Privacy Act, yet deny any remedy for that harm unless the individual further proved a more narrow type of injury quantifiable in "actual damages." This is particularly so given that inherently difficult-to-quantify emotional harms are the predominant ones that result from privacy invasions. *See infra* pp. 27-28, 31. The Act's language, structure, and context make plain that Congress does provide a remedy for

individuals who suffer an "adverse effect" caused by an agency's "intentional or willful" violation – $1,000 statutory damages that do not depend on proof of "actual damages."

B. A Proper Interpretation Of The Privacy Act's Civil Remedies Provision Avoids Absurd Results And Potential Unconstitutionality

A proper interpretation of the Privacy Act's civil remedies provision must not lead to absurd results, which "are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 574 (1982); *accord, e.g, Clinton v. City of New York*, 524 U.S. 417, 429 (1998). It is likewise "'a cardinal principle' of statutory interpretation" that when a particular construction "raises 'a serious doubt' as to [a statute's] constitutionality, 'this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). Petitioner's interpretation of the Act avoids the pitfalls of absurd results and constitutional defect; the court below's does not.

The United States' liability to individuals who successfully establish claims under Section 552a(g)(1)(D) is "an amount equal to the sum of" damages under Section 552a(g)(4)(A) "*and*" costs and attorney fees under Section 552a(g)(4)(B). (emphasis added). The usual rule is that a statutory attorneys' fees award only extends to a prevailing party. *See, e.g., Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 603-04 (2001). Petitioner's interpretation of the Act comports with this usual rule. An individual who has proven an adverse effect caused by an agency's intentional or willful violation of the Act is entitled to at least $1,000 statutory damages, a success that triggers a concomitant award of attorneys' fees.

The court below's interpretation, however, suggests that an individual who cannot plead or prove "actual damages," but who can prove an "adverse effect" caused by an "intentional or willful" violation of the Act, would receive an award of attorneys' fees despite no entitlement to any other form of relief. This is because the damages and attorneys' fees subsections of Section 552a(g)(4) are conjunctive ("the sum of" damages "and" attorneys' fees), with no language conditioning attorneys' fees on a damages award. An attorneys' fees award unaccompanied by any remedial award would be, to say the least, odd.

Indeed, such a result would suggest a constitutional defect in the Act. If it is possible – as the decision below suggests (Pet. App. 31a-32a & n.3), and as the government suggested in its opposition to certiorari (Opp. 9; Pet. Rep. 5) – to plead a Privacy Act cause of action in which the only possible relief is attorneys' fees, then the Act would allow a suit even when there is no Article III case or controversy. This Court repeatedly has held that

> a plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit. The litigation must give the plaintiff some other benefit besides reimbursement of costs that are a byproduct of the litigation itself. An "interest in attorney's fees is . . . insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim."

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 107 (1998) (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990)); *accord, e.g, Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000); *Diamond v. Charles*, 476 U.S. 54, 70 (1986). The Privacy Act should not be read to raise this constitutional defect; indeed, it cannot be read to do so.

C. Congress Has Repeatedly Used Language Identical To That In Section 552a(g)(4)(A) To Create Privacy-Protection Statutory Damages Remedies That Do Not Require Proof Of Actual Damages

In the years since Congress enacted the Privacy Act, it has thrice employed language identical in all material respects to that in Section 552a(g)(4) in other privacy-protection statutes. Each time Congress created a statutory damages remedy that does not require proof of actual damages. *See* Tax Reform Act of 1976, Pub. L. No. 94-455 §§ 1201(i)(2)(A), 1202(e)(1), 90 Stat. 1520, 1665-66, 1687 (codified at 26 U.S.C. § 6110(j)(2)(A) and 26 U.S.C. § 7217(c) (Supp. 1981) (repealed 1982)); Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508 § 201, 100 Stat. 1848, 1866 (codified at 18 U.S.C. § 2707(c)). When statutes share "similarity of language," and especially when they "share a common *raison d'etre*," they "should be interpreted *pari passu*." *Northcross v. Board of Educ.*, 412 U.S. 427, 428 (1973) (*per curiam*); *accord, e.g., Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979). Congress' repeated use of language identical to that in Section 552a(g)(4) to create statutory damages remedies that do not depend on proof of actual damages confirms that Congress clearly understood and intended Section 552a(g)(4) to do so in the first place.

Two years after the Privacy Act's enactment, in the Tax Reform Act of 1976, Congress authorized lawsuits against federal officials for improper disclosure of tax return information. With inconsequential variations, the statute employed the same structure and language as Section 552a(g)(4):

> [T]he defendant shall be liable to the plaintiff in an amount equal to the sum of—
>
> (1) actual damages sustained by the plaintiff as a result of the unauthorized disclosure of the return or return information and, in the case of a willful disclosure or a disclosure which is the result of gross negligence, punitive damages, but in no case shall a plaintiff entitled to recovery receive less than the sum of $1,000 with respect to each instance of such unauthorized disclosure
>
> . . . .

26 U.S.C. § 7217(c) (Supp. 1981) (repealed 1982).

Congress intended this provision to permit statutory damages even in the absence of actual damages: "[B]ecause of the difficulty in establishing in monetary terms the damages sustained by a taxpayer as the result of the invasion of his privacy caused by an unlawful disclosure of his returns or return information, the amendment provides that these damages would, in no event, be less than liquidated damages of $1,000 for each disclosure." S. Rep. No. 94-938, at 348 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2897, 3778. The federal courts have confirmed this reading of the statute. *See Johnson v. Sawyer*, 120 F.3d 1307, 1313 (5th Cir. 1997) ("[A] plaintiff is entitled to his actual damages sustained as a result of an unauthorized disclosure . . . or to liquidated damages of $1,000 per such disclosure[.]"); *Rorex v. Traynor*, 771 F.2d 383, 387-88 (8th Cir. 1985) (same); *cf. Scrimgeour v. Internal Revenue*, 149 F.3d 318, 327 n.11 (4th Cir. 1998) (interpreting Section 7217(c)'s successor statute identically).

In a separate provision of the same act, Congress employed nearly identical language to describe the United States' liability where an Internal Revenue Service employee "intentionally or willfully" fails to delete personal information from tax documents requested by third parties:

> [T]he United States shall be liable to the person in an amount equal to the sum of—
>
> (A) actual damages sustained by the person but in no case shall a person be entitled to receive less than the sum of $1,000 . . . .

26 U.S.C. § 6110(j)(2)(A).

As with Section 7217(c), Congress stated that this provision, which also tracks Section 552a(g)(4) of the Privacy Act, "includ[es] minimum damages of $1,000 plus costs." H.R. Conf. Rep. No. 94-1515, at 475 (1975). No court has interpreted this provision, but given that the relevant language is virtually identical to Section 7217(c), there is no reason to believe that a judicial interpretation would differ in any respect. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) (the "normal rule of statutory construction [is] that identical words used in different parts of the same Act are intended to have the same meaning").

In 1986, Congress once again used language virtually identical to Section 552a(g)(4), this time in the Electronic Communications Privacy Act, which prohibits unauthorized access to electronic communications:

> The court may assess as damages in a civil action under this section the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation, but in no case shall a person entitled to recover receive less than the sum of $1,000. . . .

18 U.S.C. § 2707(c).

Again, Congress understood, and intended, this language to create a statutory minimum damages award that does not depend on proof of actual damages. *See* H.R. Rep. No. 99-647, at 74 (1986) ("Damages include actual damages, any lost profits but in no case less than $1,000."); S. Rep. No. 99-541, at 43 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3597 ("[D]amages under the section includ[e] the sum of actual damages suffered by the plaintiff and any profits made by the violator as the result of the violation . . . with minimum statutory damages of $1,000."); *United Labs., Inc. v. Rukin*, No. 98 C 602, 1999 WL 608712, at *5 (N.D. Ill. Aug. 4, 1999) (same). Furthermore, Congress enacted Section 2707(c)

against the backdrop of an unbroken line of federal court decisions interpreting identical language in Section 552a(g)(4)(A) of the Privacy Act and Section 7217(c) of the Tax Reform Act of 1976 to allow statutory damages without proof of actual damages. *See Rorex*, 771 F.2d at 387-88 (Tax Reform Act); *Johnson v. Department of Treasury*, 700 F.2d 971, 977 & n.12 (5th Cir. 1983) (Privacy Act); *Fitzpatrick v. IRS*, 665 F.2d 327, 331 (11th Cir. 1982) (same); *Parks v. IRS*, 618 F.2d 677, 683 (10th Cir. 1980) (same).

These subsequent statutes confirm that, in privacy-protection statutes, Congress has frequently used language identical in all material respects to that found in Section 552a(g)(4). Each time, Congress understood that these words created, and intended them to create, a statutory damages remedy that does not depend upon proof of actual damages. There is no reason to ascribe the language in Section 552a(g)(4) a different meaning.

D. The Sovereign Immunity Canon Of Construction Provides No Reason To Depart From The Interpretation Compelled By The Act's Language, Structure, And Context

The fact that the Privacy Act waives the United States' sovereign immunity does not provide a reason to depart from the interpretation compelled by the Act's plain language, structure, and context. To the contrary, reaching a different interpretation in service to a sovereign immunity canon of construction would be improper for two reasons.

First, the rule that statutes waiving sovereign immunity are to be strictly construed "does not . . . require explicit waivers to be given a meaning that is implausible." *United States v. Williams*, 514 U.S. 527, 540 (1995) (Scalia, J., concurring); *see also United States v. Rice*, 327 U.S. 742, 752-53 (1946) ("Statutory language and objective, thus appearing with reasonable clarity, are not to be overcome by resort to a

mechanical rule of construction, whose function is not to create doubts, but to resolve them when the real issue of statutory purpose is otherwise obscure."). As this Court has held, the "exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced." *United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366, 383 (1949) (internal quotation marks and citation omitted); *accord, e.g., Williams*, 514 U.S. at 541 (Scalia, J., concurring).

Acceptance of a "strained reading" or "technical argument[s]" to deny a remedy to an individual who has suffered an "adverse effect" caused by an "intentional or willful" violation of the Privacy Act – despite clear language providing one in the form of statutory damages – would flout this Court's "preference for commonsense inquiries over formalism," even where a statute waives sovereign immunity. *Williams*, 514 U.S. at 536. Moreover, doing so would set a "clear language" bar so high as to make it difficult for Congress ever to surmount. At worst, this would threaten Congress' supremacy in legislative matters; at best, it would force Congress back to the drawing board repeatedly to achieve a clearly-intended waiver, wasting valuable time and legislative resources. *See* J. Nagle, *Waiving Sovereign Immunity In an Age of Clear Statement Rules*, 1995 Wis. L. Rev. 771, 819-20, 826.

Second, the sovereign immunity canon of construction applies only to the questions of (i) whether the government has waived its right to be sued by the plaintiff (*see, e.g., United States v. Sherwood*, 312 U.S. 584, 587-88 (1941)); and (ii) whether the government has waived its right to be subject to a given remedy (*see, e.g., Lane v. Pena*, 518 U.S. 187, 191 (1996) (monetary remedies); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34-35 (1992) (same); *Library of Congress v. Shaw*, 478 U.S. 310, 314-15 (1986) (interest)). There is no

dispute that in Section 552a(g) of the Privacy Act, the United States waived its immunity from suit and from monetary remedies.

When these waivers are clear, as they are in the Privacy Act, the sovereign-immunity canon of construction does not reach more deeply into a statute to govern every subsidiary question of its operation and administration. *See West v. Gibson*, 527 U.S. 212, 222 (1999) (questions concerning "how the waived damages remedy is to be administered" are "distinct," their relationship "to the goals and purposes of the doctrine of sovereign immunity may be unclear," and "ordinary sovereign immunity presumptions may not apply"). This is well demonstrated by this Court's decisions in *Canadian Aviator, Ltd. v. United States*, 324 U.S. 215 (1945), and *American Stevedores, Inc. v. Porello*, 330 U.S. 446 (1947). Each involved interpretation of the Public Vessels Act, ch. 428, 43 Stat. 1112 (1925), which clearly waived the United States' immunity from suit "for damages caused by a public vessel of the United States." *Id.* § 1.

In *Canadian Aviator*, the government argued that the words "caused by" in the Public Vessels Act meant that suits could be brought only when a "collision" with a public vessel led to damages. 324 U.S. at 222. The Court acknowledged that "the general history of the Act . . . does not establish that the statute necessarily extends to the noncollision cases in view of the rule of strict construction of statutory waiver of sovereign immunity." *Id.* But the Court held the sovereign immunity canon of construction inapplicable to this causation question; the "broad statutory language authorizing suit . . . is not to be thwarted by an unduly restrictive interpretation." *Id.*

The government contended in *American Stevedores* that the word "damages" in the Public Vessels Act effected a waiver to liability for "damage to property," but not "injury to the person." 330 U.S. at 450. The Court refused to parse the word "damages" this way pursuant to a sovereign immunity

canon. The United States had plainly consented to monetary damages remedies, and the Court could not "believe that the Public Vessels Act, read in the light of its legislative history, evinces a Congressional intent only to provide a remedy to the owners of damaged property." *Id.* at 454.

The same analysis applies in this case. The Privacy Act clearly waives the United States' immunity to suit and to monetary remedies. The question at issue is the type of proof that an individual must produce to recover monetary relief. This is a subsidiary question of the Privacy Act's operation to which the sovereign immunity canon does not apply.

II. THE AVAILABILITY OF STATUTORY DAMAGES THAT DO NOT REQUIRE PROOF OF ACTUAL DAMAGES FULFILLS THE PRIVACY ACT'S PURPOSES AND IS CONSISTENT WITH OMB'S PRIVACY ACT GUIDELINES

The object and policy of the Privacy Act, as expressed in both its text and legislative history, confirm that the civil remedies provision was intended to remedy the harms that typically result from a privacy invasion and to encourage robust enforcement of the Act's privacy protections. These purposes are fulfilled only if the civil remedies provision is interpreted in accordance with its plain text – to award $1,000 in statutory damages to an individual who proves an "adverse effect" caused by an agency's "intentional or willful" violation of the Act. Furthermore, OMB's longstanding Privacy Act Guidelines, promulgated within months of the Act's effective date, confirm that a $1,000 statutory damages award under the Act is not conditioned on proof of "actual damages."

A. Awarding $1,000 Statutory Damages To Any Individual Who Proves An "Adverse Effect" Caused By An "Intentional Or Willful" Violation Of The Privacy Act Fulfills The Act's Purposes As Expressed In Its Text And Legislative History

The object and policy of the Privacy Act are plain. Congress found that a "right to privacy is a personal and fundamental right protected by the Constitution of the United States." Pub. L. No. 93-579 § 2(a)(4). The Act "provide[s] certain safeguards for an individual against an invasion of personal privacy," chief among them making federal agencies "subject to civil suit for *any* damages which occur as a result of willful or intentional action which violates any individual's rights under th[e] Act." *Id.* §§ 2(b), 2(b)(6) (emphasis added). Congress intended the civil remedies provision to "encourage the widest possible citizen enforcement through the judicial process." S. Rep. No. 93-1183, at 83, *reprinted in Source Book* at 236; *accord* H.R. Rep. No. 93-1416 at 15, *reprinted in Source Book* at 308 ("best means" to enforce the Act is "constant vigilance of individual citizens backed by legal redress"). Thus, the Act posits civil suits as serving two goals: (1) to remedy the harm typically caused by a privacy violation, not just that quantifiable as "actual damages"; and (2) to deter federal agencies from violating the Act's privacy protections.

"In determining the meaning of [a] statute," this Court "look[s] not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon v. United States*, 494 U.S. 152, 158 (1990). The Act's civil remedies provision serves its remedial and deterrent functions when it awards $1,000 statutory damages to an individual who proves an "adverse effect" caused by an "intentional or willful" violation. Privacy is a dignitary interest, and "in a great many of the cases" in which this interest is invaded "the only harm is affront to the plaintiff's dignity as a human being, the damage to his self-image, and

the resulting mental distress." 2 D. Dobbs, *Law of Remedies* § 7.1.1 (2d ed. 1993); *accord, e.g., Time, Inc. v. Hill*, 385 U.S. 374, 384 n.9 (1967). These are real harms or, in the parlance of the Privacy Act, "adverse effects." Indeed, when, as in this case, a federal agency discloses a social security number, the emotional distress is compounded by the well-founded fear of consequences like identity theft, a crime rapidly growing in frequency and severity. *See* General Accounting Office Report 02-352, *Social Security Numbers: Government Benefits From SSN Use But Could Provide Better Safeguards* 13-14 (2002).

When a worst-case scenario like identity theft materializes, the individual will likely be able to quantify some "actual damages." But for those individuals who are fortunate enough to avoid the worst case, the "adverse effect" of emotional distress that results from the privacy invasion is nonetheless real, albeit difficult to quantify for purposes of establishing actual damages – as is true in all types of privacy invasion claims. *See* 2 Dobbs, *supra*, § 7.2; *Restatement (Second) of Torts* § 652H cmt. b (1977).[6] Providing a statutory damages remedy in these situations ensures that the Act reaches all those Congress intended to protect by providing an incentive to bring suit even when actual damages cannot be proven. This in turn ensures that robust civil enforcement of the Act will deter agency violations. *See Story Parchment*, 282 U.S. at 563 (where the wrong is "of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to

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[6] *See also, e.g, Scrimgeour*, 149 F.3d at 327 n.11 ("Actual damages for the invasion of privacy . . . can be hard to quantify."); *Michaels v. Internet Entm't Group, Inc.*, 5 F. Supp. 2d 823, 842 (C.D. Cal. 1998) ("Although monetary damages are available for [privacy] injuries, they are difficult to quantify . . . ."); *Williams v. Poulos*, 801 F. Supp. 867, 874 (D. Me. 1992) ("Invasion of privacy . . . inflicts damage which is both difficult to quantify and impossible to compensate fully with money damages."), *aff'd*, 11 F.3d 271 (1st Cir. 1993).

deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts").

If the Act does not provide a remedy in these circumstances, then few Privacy Act suits can be brought successfully, if they can be brought at all. This would markedly reduce – if not eliminate outright – the Act's capacity to remedy existing privacy violations and deter future privacy violations. This weakening effect would be amplified by the Act's already significant barriers to recovery. The Privacy Protection Study Commission's review of the Act noted that "[t]he vast number of systems involved, the need to establish willful or intentional behavior on the part of the agency, and the cost and time involved in bringing a law suit, often make enforcement by the individual impractical." Privacy Protection Study Comm'n, *Personal Privacy in an Information Society* 529 (1977); *see* Pub. L. No. 93-579 §§ 5(b)-(d) (creating the Commission and authorizing the study). Congress and commentators agree that the "intentional and willful" level of culpability a Privacy Act plaintiff must demonstrate is a formidable barrier. *See Analysis of House and Senate Compromise Amendments to the Federal Privacy Act*, 120 Cong. Rec. 12,243 (daily ed. Dec. 18, 1974), *reprinted in Source Book* at 858, 861-62 [hereinafter *Analysis of House and Senate Compromise*]; 2 B. Braverman & F. Chetwynd, *Information Law* § 21-3.3.3 (1985); 2 J. O'Reilly, *Federal Information Disclosure* §§ 22.30, 22.57 (3d ed. 2000).

The legislative history leading to the final version of Section 552a(g)(4) confirms that Congress carefully crafted a means of ensuring that harms suffered as a result of a violation of the Act would be remedied, that adversely affected individuals would have adequate incentive to enforce the Act, and that the Act would deter future agency violations. It also installed checks – an "intentional and willful" culpability standard and a $1,000 cap on statutory damages – to ensure

that the Act would not expose the United States to excessive liability.

Section 552a(g)(4) emerged as a compromise between Senate and House bills. The Senate bill would have made the United States liable for negligent privacy violations, with liability measured as "any actual and general damages sustained by any person but in no case shall a person entitled to recovery receive less than the sum of $1,000." S. 3418 § 303(c)(1), *reprinted in Source Book* at 371. The Senate Committee on Government Operations specifically recommended the addition of a $1,000 statutory damages provision as "liquidated damages . . . [to be] assessed against the agency for a violation of the Act." *Source Book* at 768. In common-law and statutory contexts, recovery of "liquidated damages" does not require any proof of "actual damages." C. McCormick, *Damages* 622 (1935); 3 Dobbs, *supra,* § 12.9(2); *Rex Trailer Co. v. United States*, 350 U.S. 148, 153-54 (1956) ("liquidated damages" under the Surplus Property Act "serve a particularly useful function when damages are uncertain in nature or amount or are unmeasurable"); *Scofield v. Telecable of Overland Park, Inc.*, 751 F. Supp. 1499, 1521 (D. Kan. 1990) ('liquidated damages" under the Cable Communications Policy Act "are properly awardable even without a showing of actual damages"), *rev'd on other grounds*, 973 F.2d 874 (10th Cir. 1992).

The House bill would have made the United States liable for "willful, arbitrary, or capricious" violations, reflecting a concern that the government's liability be constrained by a strict culpability requirement. H.R. 16373 § 552a(g)(3)(A), *reprinted in Source Book* at 288; *see also Source Book* at 926-28 (House debate on culpability requirement). The House bill measured liability as "actual damages sustained by the individual as a result of the refusal or failure" to comply with privacy protections. H.R. 16373 § 552a(g)(3)(A), *reprinted in*

Source Book at 288 Several House members, however, specifically noted their concern that

> Actual damages resulting from an agency's misconduct will, in most cases, be difficult to prove and this will often effectively preclude an adequate remedy at law. Moreover, if we are concerned with effectively deterring the willful, arbitrary, or capricious disclosure or transfer of protected records, a provision permitting a court to assess punitive damages or, at the very least, liquidated damages is essential.

H.R. Rep. No. 93-1416, at 38, *reprinted in Source Book* at 330.

The final version of the Act "represent[ed] a compromise between the two positions." *Analysis of House and Senate Compromise, reprinted in Source Book* at 862. The House bill's culpability standard was retained in slightly softened form – an "intentional or willful" standard that is "somewhat greater than gross negligence." *Id.* The Senate's $1,000 liquidated damages provision was added to the "actual damages" provision in the House bill. *Id.* at 851.

The final Act thus allows individuals to recover some damages for the dignitary harm, and associated emotional distress, of a privacy invasion – more often than not the only harm associated with such a claim. 2 Dobbs, *supra*, § 7.3(4). This ensures that the civil remedies provision serves the Act's goals to remedy the harms typically caused by a privacy violation and to deter future agency violations. The availability of liquidated damages also provides an incentive to "the widest possible citizen enforcement through the judicial process." S. Rep. No. 93-1183, at 83, *reprinted in Source Book* at 236. At the same time, the $1,000 cap on liquidated damages, particularly when combined with the strict culpability element, mitigates the risk of excessive government liability. 2 Dobbs, *supra*, § 7.3(4).

Finally, it is noteworthy that, as enacted, the Privacy Act's civil remedies provision parallels common-law remedies in intentional torts generally, and privacy torts specifically. Congress "legislate[s] against a background of common-law adjudicatory principles" (*Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991)), and this Court often looks to this background to "defin[e] the elements of damages and the prerequisites for their recovery" in federal statutes. *Carey*, 435 U.S. at 257-58. The Act defines liability for "intentional or willful" actions. At common law, intentional torts (such as battery and false imprisonment) do not require proof of actual damages as a prerequisite to recovery. *See, e.g.*, McCormick, *supra*, § 107. Rather, some amount of damages (even if nominal) is awarded to vindicate the legally protected interest itself, to remedy harms presumed to result even if not quantifiable, and to encourage suits to vindicate the protected interest. 2 Dobbs, *supra*, §§ 7.1(1), 7.1(2); *see also Restatement (Second) of Torts* § 902 cmt. a. The same is true in common-law privacy torts, in which a plaintiff may "recover damages for emotional distress or personal humiliation that he proves to have been actually suffered by him, if it is of a kind that normally results from such an invasion." *Restatement (Second) of Torts* § 652H cmt. b. If quantifiable, actual damages are recoverable as well, but their absence does not preclude any recovery at all. *Id.* cmt. d; *see* D. Elder, *Privacy Torts* § 2:10 (2002). Thus, an interpretation of the Privacy Act that allows statutory damages for "intentional or willful" violations, even absent provable actual damages, conforms with analogous common-law tort remedies that serve the same purposes Congress intended the Act to serve.

B. OMB's Privacy Act Guidelines Interpret The Privacy Act To Allow A $1,000 Statutory Damages Award Without Proof Of Actual Damages

Congress tasked the OMB to "develop guidelines and regulations for the use of agencies in implementing the provisions of" the Privacy Act and to "provide continuing assistance to and oversight of the implementation of the provisions [of the Act] by agencies." Pub. L. No. 93-579 § 6 (current version codified at 5 U.S.C. § 552a(v)). Seven months after the Act's effective date, OMB promulgated the Privacy Act Guidelines. 40 Fed. Reg. 28,948 (1975). The Guidelines speak directly to the issue presented in this case, interpreting Sections 552a(g)(1)(D) and (g)(4)(A) to mean that "[w]hen the court finds that an agency has acted willfully or intentionally in violation of the Act in such a manner as to have an adverse effect upon the individual, the United States will be required to pay . . . actual damages or $1,000, whichever is greater . . . ." *Id.* at 28,970. OMB's "interpretation of the statute, like its legislative history, confirms what is clear from the statute's plain language." *Wimberly v. Labor and Indus. Relations Comm'n of Mo.*, 479 U.S. 511, 522 (1987). Statutory damages are not contingent upon proof of actual damages. Rather, they are an alternative available to individuals who cannot quantify actual damages.

OMB's interpretation is entitled to great respect for three reasons.[7] *First*, OMB's interpretation is consistent with the

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[7] *See generally United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) ("'The weight [accorded to an administrative] judgment . . . will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade . . . .'" (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). Lower federal courts have afforded the Guidelines "the deference usually accorded interpretation of a statute by the agency charged with its administration[.]" *Albright v. United States*, 631 F.2d 915, 919 n.5 (D.C. Cir. 1980); *accord, e.g.*,

Privacy Act's language, structure, context, and purpose. *See Wimberly*, 479 U.S. at 522. *Second*, OMB's Guidelines "'involve[] a contemporaneous construction of a statute by the [agency] charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new.'" *Power Reactor Dev. Co. v. International Union of Elec. Radio & Mach. Workers*, 367 U.S. 396, 408 (1961) (quoting *Norwegian Nitrogen Prods. v. United States*, 288 U.S. 294, 315 (1933)); *accord, e.g., Aluminum Co. of Am. v. Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 389 (1984). *Third*, OMB's interpretation is "longstanding" and unchanged in the 28 years since its promulgation, despite numerous intervening amendments to the Guidelines. *See NLRB v. Bell Aerospace Co. Div.*, 416 U.S. 267, 274-75 (1974).[8]

Respect for OMB's interpretation, although not necessary to ground a holding that the Privacy Act awards $1,000 statutory damages without proof of actual damages, nonetheless confirms the soundness of such an interpretation.

Bechhoefer v. U.S. Dep't of Justice Drug Enforcement Admin., 209 F.3d 57, 61-62 (2d Cir. 2000); *Quinn v. Stone*, 978 F.2d 126, 133 (3d Cir. 1992); *Perry v. FBI*, 759 F.2d 1271, 1275-76 & n.7 (7th Cir. 1985); *Baker v. Department of Navy*, 814 F.2d 1381, 1383 (9th Cir. 1987); *Clarkson v. IRS*, 678 F.2d 1368, 1374 (11th Cir. 1982).

[8] *See* 40 Fed. Reg. 56,741 (1975); 48 Fed. Reg. 15,556 (1983); 52 Fed. Reg. 12,990 (1987); 54 Fed. Reg. 25,818 (1989); 56 Fed. Reg. 18,599 (1991); 61 Fed. Reg. 6,428 (1996).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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BUCK DOE, PETITIONER

v.

ELAINE L. CHAO, SECRETARY OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether an individual who has been subjected to an "intentional or willful" violation of the Privacy Act, 5 U.S.C. 552a, must prove that he suffered "actual damages" to be awarded $1000 under Section 552a(g)(4) of the Act.

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In the Supreme Court of the United States

No. 02-1377

BUCK DOE, PETITIONER

v.

ELAINE L. CHAO, SECRETARY OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-60a) is reported at 306 F.3d 170. The decision of the district court (Pet. App. 61a-68a), adopting in part the report and recommendation of the magistrate judge (Pet. App. 69a-104a), is unreported.

JURISDICTION

The court of appeals entered its judgment on September 20, 2002. A petition for rehearing and rehearing en banc was denied on November 15, 2002 (Pet. App. 1a-2a). On January 23, 2003, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including March 15, 2003, and the petition was filed on March 14, 2003. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The civil remedies provision of the Privacy Act, 5 U.S.C. 552a(g), provides:

(1) CIVIL REMEDIES.—Whenever any agency

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

(B) refuses to comply with an individual request under subsection (d)(1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

(2)(A) In any suit brought under the provisions of subsection (g)(1)(A) of this section, the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(3)(A) In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United

States shall be liable to the individual in an amount equal to the sum of—

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to September 27, 1975.

STATEMENT

1. a. The Privacy Act (the Act), 5 U.S.C. 552a, generally regulates federal agencies' disclosure of personal information, including social security numbers, to other governmental components and to the public. More specifically, the Privacy Act establishes requirements for Executive Branch agencies in their collection, maintenance, use, and dissemination of "records" containing information about an "individual" when those records are maintained as part of a "system of records." 5 U.S.C. 552a(a)(1)-(5) and (b). The Privacy Act defines a "record" as "any item, collection, or grouping of information" about a United States citizen or lawful permanent resident alien that is maintained by an agency and contains an individual identifier, such as the individual's name, identifying number, or symbol. 5 U.S.C. 552a(a)(2) and (4).

The Privacy Act prohibits certain agency disclosures of records that are contained within a "system of records" without "the prior written consent of[] the individual to whom the record pertains," 5 U.S.C. 552a(b), and allows an individual to gain access to certain records about himself and request that information in such records be amended if it is not "accurate, relevant, timely, or complete." 5 U.S.C. 552a(d). The Act further requires an agency that maintains certain systems of records to follow specific statutory requirements, including the requirement that the agency maintain records that are used to make determinations about an individual with the accuracy, relevance, timeliness, and completeness that are reasonably necessary to assure fairness to the individual in the determination. 5 U.S.C. 552a(e)(5).

The Privacy Act also regulates the use of social security numbers by federal agencies. Among other things, the Act directs that, if any government agency requests an individual to disclose his social security number, the agency "shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it." 5 U.S.C. 552a note (Pub. L. No. 93-579, § 7(b), 88 Stat. 1909).

b. The Privacy Act authorizes private civil actions to enforce its terms. If an agency fails to amend a record in response to an individual's request, 5 U.S.C. 552a(g)(2), or fails to provide an individual proper access to his record, 5 U.S.C. 552a(g)(3), the Act makes the agency subject to a suit for injunctive relief and reasonable attorney's fees. If an agency's failure to maintain a record about an individual with the requisite accuracy, relevance, timeliness, or completeness results in a determination that is "adverse" to the individual, 5 U.S.C. 552a(g)(1)(C), or if an agency "fails to comply with any other provision" of Section 552a or its implementing regulations in such a way as to "have an adverse effect on an individual," 5 U.S.C. 552a(g)(1)(D), the Act allows that individual to bring a civil action against the agency for money damages. More particularly, if the agency's failure was "intentional or willful," the Act provides that

> the United States shall be liable to the individual in an amount equal to the sum of—
>
> (A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and

> (B) the costs of the action together with reasonable attorney fees as determined by the court.

5 U.S.C. 552a(g)(4). The Privacy Act also establishes criminal penalties for willful violations of its terms. 5 U.S.C. 552a(i).[1]

2. Since the inception of the federal government's Black Lung Benefits program in 1969, see 30 U.S.C. 901 *et seq.*, the Social Security Administration, and its successor administering agency, the Department of Labor's Office of Workers' Compensation Programs, have used the voluntarily provided social security numbers of claimants seeking black lung benefits as internal case numbers in the processing of their claims. C.A. App. 108-110. Following passage of the Privacy Act, the Department of Labor published, under 5 U.S.C. 552a(a)(7), (b)(3) and (e)(4)(D), a notice of "routine use" of information compiled in the administration of black lung benefits. See 58 Fed. Reg. 49,548, 49,597 (1993). As relevant here, the notice advised black lung claimants that the administration of the benefit program entails the routine disclosure of claimants' records to persons associated with the claimant's case, including mine operators who may be liable for the claim, relevant insurance companies, and the legal representatives of relevant parties. See *id.* at 49,597-49,598. The notice further cautioned that the records subject to

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[1] Damages awards under the Privacy Act are paid out of general treasury funds, rather than agency funds. See 31 U.S.C. 1304(a); Office of Mgmt. & Budget, *Privacy Act Guidelines*, 40 Fed. Reg. 28,968 (1975) (concluding that Privacy Act judgments "would appear to be payable from public funds rather than agency funds") (citing 28 U.S.C. 2414 and 31 U.S.C. 724a (1970), the predecessor to 31 U.S.C. 1304(a)).

such disclosure may include a claimant's social security number. *Id.* at 49,597.

Prior to this litigation, administrative law judges responsible for black lung benefit cases frequently mailed multi-captioned hearing notices containing those same black-lung claim numbers—that is, the claimants' social security numbers—to claimants, their attorneys, coal companies, and insurance carriers. See Pet. App. 5a. Each multi-captioned hearing notice encompassed approximately 15 to 20 different cases and the parties associated with them. C.A. App. 88.[2]

3. In February 1997, petitioner and six other black lung claimants filed lawsuits, using pseudonyms, against the Secretary of Labor under the Privacy Act, alleging that the Department's practice of disclosing claimants' social security numbers to third parties while processing black lung benefits claims violated the Privacy Act. Pet. App. 5a-6a. The cases were consolidated, and the Department of Labor promptly consented to the entry of a stipulated order under which it agreed to discontinue its use of social security numbers on multi-captioned hearing notices. *Id.* at 6a; J.A. 12-13.

In support of a claim for damages, petitioner submitted an affidavit in which he stated that the disclosure of his social security number on multi-captioned

[2] The Privacy Act permitted the Office of Workers' Compensation Programs to use the claimants' voluntarily provided social security numbers as internal identification numbers, and the Act's routine use provision (5 U.S.C. 552a(b)(3)) permitted the Office to disclose the numbers to parties associated with each claimant's individual case. However, the external disclosure of a claimant's social security number to the numerous persons involved in other cases listed on the multi-captioned hearing notice violated the Privacy Act's limitations on agency disclosures. Cf. 5 U.S.C. 552a(b).

hearing notices had "torn me all to pieces," and that "no amount of money could compensate me for worry and fear of not knowing when someone would use my name and Social Security number." J.A. 15. At the same time, petitioner acknowledged that his social security number had been on his driver's license until more than a year after his suit was filed, and that it "probably" was pre-printed on all of his checks. J.A. 1, 17, 23. No other plaintiff identified any adverse consequence arising from the Department's dissemination of his social security number. Pet. App. 18a n.7, 22a.

The plaintiffs then sought to certify a class of "all claimants for Black Lung Benefits through the United States Department of Labor since the passage of the Privacy Act." C.A. App. 79, 81; Pet. App. 6a. The plaintiffs asserted that there were "thousands of members of the class," C.A. App. 80, noting that there were nearly 23,000 active claims for black lung benefits pending during the relevant time period, and that many of those claimants "would have an identical claim for violations of the Privacy Act," *id.* at 88. The plaintiffs further estimated that close to 100,000 black lung cases had been scheduled for hearings, and that if each multi-captioned hearing notice had been distributed to 40 or 50 strangers, then there would have been "approximately four to five million" Privacy Act violations. See Mem. in Opp. to Def.'s Supp. Summ. J. Mot. 17. Asserting that each class member had an automatic entitlement to a minimum $1000 award for each violation of the Act, the plaintiffs concluded that the "multiplication is mind-boggling" and that, however large those numbers may be, the Department of Labor "is liable in the appropriate, corresponding amount." *Id.* at 14, 17; see also C.A. App. 95.

The district court denied class certification and granted summary judgment for the Department with respect to all claims for damages, except for petitioner's. Pet. App. 61a-68a; see also *id.* at 69a-104a (report and recommendation of magistrate judge). The court first concluded that the Department's mailing of multi-captioned hearing notices containing a claimant's social security number to persons not associated with the claimant's case violated the Privacy Act's nondisclosure provision (5 U.S.C. 552a(b)), and that the practice constituted an "intentional or willful" violation of the Act. Pet. App. 86a-92a, 94a-97a. With respect to petitioner, the district court agreed with the government that proof of actual damages was required. *Id.* at 66a & n.2. The court concluded, however, that petitioner had submitted "sufficient incontrovertible evidence * * * that he suffered 'actual damages,' in the form of emotional distress," and it awarded him the "statutory minimum amount" of damages of $1000. *Id.* at 66a-67a. With respect to the other named plaintiffs, the court adopted the magistrate judge's finding that none of them had identified any adverse effect resulting from the Department of Labor's inclusion of their social security numbers on the multi-captioned hearing notices. *Id.* at 65a-67a, 99a-100a.

4. a. The court of appeals reversed the district court's grant of summary judgment to petitioner, and otherwise affirmed the district court's grant of summary judgment to the Department. Pet. App. 3a-60a. The court rejected petitioner's argument that he was automatically entitled to an award of $1000 for having proved an intentional or willful violation of the Privacy Act, holding that the Privacy Act's remedial provision requires plaintiffs to demonstrate some "actual damages" before they may obtain the statutory minimum award of $1000. *Id.* at 9a.

The court of appeals first noted that Congress has restricted the minimum $1000 damages award to a "person entitled to recovery," 5 U.S.C. 552a(g)(4). By placement of that phrase within a subparagraph "the sole and entire purpose of which is to limit the liability of the United States to actual damages sustained," Pet. App. 9a, the court explained, "Congress has defined 'recovery' (albeit indirectly) by its express limitation of the Government's liability to actual damages sustained." *Ibid.* The provision thus serves only to "provide[] for a 'statutory minimum' to actual damages" in cases "where actual damages are greater than $0 but less than $1,000." *Ibid.* That reading "gives effect to the eminently reasonable * * * presumption that the legislature correlated the plaintiff's recovery entitlement with the defendant's liability by limiting the plaintiff's recovery to actual damages and by providing, by way of incentive to suit, for at least a minimum recovery even where actual damages are minimal." *Id.* at 10a. At the same time, the court concluded, Congress's decision only "to *augment* damages awards for persons able to demonstrate some 'actual damages' * * * serve[d] a competing objective: preventing the imposition of potentially substantial liability for violations of the Act which cause no 'actual damages' to anyone." *Id.* at 11a n.2.

The court also found its reading to be compelled "as a grammatical matter," because, "having just defined the recovery that will be permitted against the United States" in terms of actual damages, "it would torture all grammar to conclude that the phrase 'a person entitled to recovery' references anyone other than one who has sustained actual damages." Pet. App. 10a (emphasis

omitted). Had Congress intended to allow an automatic award of $1000, without any showing of actual damages, the court explained, it could have done so "unequivocally" through "clear" language. *Id.* at 10a-11a.

Finally, because the Privacy Act's remedial provisions are a limited waiver of sovereign immunity, the court concluded that the scope of the waiver must be "strictly construed . . . in favor of the sovereign." Pet. App. 13a-14a.

Having found that petitioner's entitlement to the $1000 award depended on a showing of actual damages, the court concluded that petitioner's allegations of emotional upset, which did not include "any evidence of tangible consequences stemming from his alleged angst over the disclosure of his [social security number]," Pet. App. 17a, did not constitute sufficient evidence of actual damages to sustain an award under Section 552a(g)(4)(A).[3]

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[3] Petitioner did not seek this Court's review of that aspect of the court of appeals' holding. The court of appeals reserved "the issue of whether the term 'actual damages' as used in the Act encompasses damages for non-pecuniary emotional distress." Pet. App. 17a-18a. Accordingly, that issue, on which the courts of appeals have entered conflicting decisions, is not before the Court either. Compare *Hudson* v. *Reno*, 130 F.3d 1193, 1207 n.11 (6th Cir. 1997) ("actual damages" is limited to pecuniary losses), cert. denied, 525 U.S. 822 (1998), disapproved in part not relevant by *Pollard* v. *E.I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001), and *Fitzpatrick* v. *IRS*, 665 F.2d 327, 330-331 (11th Cir. 1982) (same), with *Johnson* v. *Department of Treasury, IRS*, 700 F.2d 971, 974-986 (5th Cir. 1983) ("actual damages" includes non-pecuniary emotional distress damages). In any event, even if some forms of emotional distress are compensable under the Privacy Act's damages provision, petitioner's alleged fear of future harm, unaccompanied by any other current injury, is not traditionally compensable. Cf. *Metro-North Commuter R.R.* v. *Buckley*, 521 U.S. 424, 432 (1997) (common-law courts generally deny relief to individual who is exposed to hazardous substance and fears that he will become diseased in the future, but who suffers no current physical impairment).

b. Judge Michael dissented from the majority's holding that an individual must prove actual damages to receive an award of $1000 under Section 552a(g)(4)(A). Pet. App. 24a-60a. Admitting that the "question is somewhat close," *id.* at 30a, and that his reading of the statute "is not inevitable," *id.* at 45a, Judge Michael would have held that a plaintiff "can recover statutory damages of $1,000 upon proof that he has suffered an adverse effect as a result of an intentional or willful violation of the Privacy Act, § 552a(g)(1)(D), (g)(4)." *Id.* at 25a. In Judge Michael's view, that reading better comports with "policy considerations" and "Congress's purposes." *Id.* at 47a.

SUMMARY OF ARGUMENT

The Privacy Act permits individuals whose rights have been violated to sue to recover "actual damages sustained by the individual * * *, but in no case shall a person entitled to recovery receive less than the sum of $1,000." 5 U.S.C. 552a(g)(4)(A). The court of appeals correctly held that the remedial language does not authorize an automatic award of $1000 in the absence of a showing of actual damages. Rather, the $1000 award provides a guaranteed minimum recovery for individuals who have demonstrated actual damages, while allowing them and the court to avoid the resource-intensive process of precisely quantifying those damages when their relatively small amount renders such an effort not worth the candle.

Because the Privacy Act's remedial provisions constitute a limited waiver of the United States' sovereign

immunity, the question is not whether the statutory text could be read to provide for automatic statutory damages. The question is whether the statutory text clearly and unequivocally compels that conclusion. It does not. By its terms, the Privacy Act makes the minimum $1000 award available not to every individual who establishes the existence of an intentional or willful violation, but only to a "person entitled to recovery." The word "recovery" is most naturally understood to refer to *compensation* awarded as a remedy for prior wrongs —and, in the present context, to the "actual damages" specifically authorized by Section 552a(g)(4)(A). Absent proof of the type of harm that would support an "actual damages" award, a Privacy Act plaintiff therefore is not a "person entitled to recovery" under the Act, even if he can demonstrate the commission of an intentional or willful violation.

If Congress had wanted to demarcate the $1000 payment as a distinct form of automatic statutory damages, available even to a plaintiff who has failed to establish any "actual damages," it could easily have achieved that result. Congress could simply have provided for "actual damages *or* statutory damages of $1000, whichever is greater." Alternatively, Congress could have authorized the payment of "statutory" or "liquidated" damages in its own subsection, separate and apart from the "actual damages" provision. Such labeling or distinct itemization of statutory and liquidated damages is how Congress has provided for such awards in more than a dozen other statutes, including a number of privacy laws. Congress's decision to take a different course in the Privacy Act, and instead to restrict the $1000 minimum award to "person[s] entitled to recovery," therefore must be given meaningful effect by the courts.

Although petitioner discusses at length the Act's legislative history and policy considerations, sovereign immunity can be waived only by duly enacted statutory text. Neither committee reports nor unidimensional notions of good policy can open the federal Treasury to monetary awards that Congress did not expressly authorize. In any event, the legislative history undermines petitioner's argument. Both the House and the Senate repeatedly failed to enact versions of the remedial provision that would have expressly authorized awards of liquidated or statutory damages even in the absence of any actual damages. The legislative compromise that produced the Privacy Act, moreover, eschewed expanding the government's monetary liability beyond actual damages, choosing instead to task a newly formed Commission with studying the need for some form of automatic damages.

Petitioner's policy arguments fare no better. Congress did not legislate with a single-minded focus on encouraging Privacy Act damage claims. It sought to balance the need for effective remedies with responsible fiscal judgments. Congress struck that reasonable balance by allowing actual damages—with a guaranteed minimum recovery to obviate proof difficulties and simplify litigation for many of the small claims that Privacy Act violations can produce—while tabling the inclusion of further remedies pending further study.

ARGUMENT

THE PRIVACY ACT REQUIRES A PLAINTIFF TO DEMONSTRATE ACTUAL DAMAGES BEFORE HE MAY OBTAIN THE STATUTORILY PRESCRIBED MINIMUM AWARD OF $1000 UNDER 5 U.S.C. 552a(g)(4)(A)

The Privacy Act establishes a carefully calibrated damages remedy against federal agencies for intentional or willful violations of certain provisions of the Act, including the improper disclosure of a social security number. Specifically, the Privacy Act provides that, in such a suit,

> the United States shall be liable to the individual in an amount equal to the sum of—
>
> (A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and
>
> (B) the costs of the action together with reasonable attorney fees as determined by the court.

5 U.S.C. 552a(g)(4). The question in this case is whether the Privacy Act entitles every individual who demonstrates an intentional or willful violation of the relevant Privacy Act provisions to an automatic payment of $1000 from the federal Treasury even if he suffered no damages whatsoever, or whether, instead, such payments are restricted to individuals who have demonstrated some actual damages.

That question of statutory construction concerns the scope of Congress's waiver of the United States' sovereign immunity from money damages and, in particular,

the amount and type of monetary liability to which Congress decided to open the federal Treasury. Under established interpretive principles, any doubt regarding the scope of Congress's waiver must be resolved in favor of preserving sovereign immunity. To obtain the automatic damages that he seeks, petitioner thus must show not simply that his own reading of the pertinent language is a plausible one, but that the statutory text clearly and unequivocally compels that reading. Petitioner cannot make that showing.

A. Congress's Waiver Of Sovereign Immunity For Automatic, Statutory Damages Must Be Clear And Unequivocal

It is a "common rule, with which [this Court] presume[s] congressional familiarity," that the United States government is immune from suit unless it has expressly waived its sovereign immunity. *Department of Energy* v. *Ohio*, 503 U.S. 607, 615 (1992); see also *Lane* v. *Pena*, 518 U.S. 187, 192 (1996).[4] Any waiver of immunity, moreover, must be "unequivocally expressed" and "not enlarged beyond what the language requires." *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 33-34 (1992) (internal alterations and quotation omitted).

The sovereign immunity of the United States encompasses not only immunity from suit, but also the authority to establish the terms upon which suit may proceed. See, *e.g.*, *Lehman* v. *Nakshian*, 453 U.S. 156, 160 (1981); *United States* v. *Testan*, 424 U.S. 392, 399 (1976) ("It

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[4] In drafting the Privacy Act, Congress legislated with that principle in mind. 120 Cong. Rec. 36,660 (1974) (Rep. Erlenborn) ("As I believe most of the lawyers in the House know, it is a general principle of law that the Government, in exercising its governmental functions, is not liable.").

has long been established, of course, that the United States, as sovereign, 'is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'") (quoting *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941)). Accordingly, even where the United States has generally waived its sovereign immunity from suit, the availability of monetary relief, interest, and jury trial depend upon an additional express and particularized waiver by Congress. See, *e.g.*, *Nordic Vill.*, 503 U.S. at 34-37 (monetary claims unavailable); *Library of Congress* v. *Shaw*, 478 U.S. 310, 318-319 (1986) (Title VII's general waiver of immunity does not authorize interest); *Lehman*, 453 U.S. at 160 (jury trial unavailable); see also *United States* v. *John Hancock Mut. Life Ins. Co.*, 364 U.S. 301, 308 (1960) (despite the general waiver of immunity from suit in 28 U.S.C. 2410, "the United States is not subject to local statutes of limitations"). Any "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Lehman*, 453 U.S. at 161; see also *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 261 (1999) (a statutory waiver must "be strictly construed, in terms of its scope, in favor of the sovereign").

Petitioner contends (Br. 24-25) that this Court should eschew a strict construction of the Privacy Act's text because Congress clearly waived the United States' immunity from suit and from some form of damages remedy. That argument fails for two reasons.

1. First and foremost, this Court's long-established precedent is flatly to the contrary. In *Price* v. *United States*, 174 U.S. 373 (1899), the question before the Court was whether a particular waiver of the government's immunity from suit for actual damages for property taken by Indians also encompassed a waiver of immunity for consequential damages—that is, "damages to other property which resulted as a consequence of the taking." *Id.* at 375. The Court held that the determination of what type of damages Congress had authorized directly implicated the United States' sovereign immunity and, as such, "its liability in suit cannot be extended beyond the plain language of the statute authorizing it." *Id.* at 376. The Court stressed that the jurisdiction of the court to award damages—including the specification of "contingencies in which the liability of the government is submitted to the courts," *ibid.*—"is a matter resting in [Congress's] discretion," *id.* at 377, and "cannot be enlarged by implication," regardless of what "may seem to this court equitable, or what obligation we may deem ought to be assumed by the government." *Id.* at 375. Similarly here, the question whether the $1000 minimum award is available to a Privacy Act plaintiff who has failed to establish any "actual damages" must be resolved through application of the canon requiring narrow construction of waivers of sovereign immunity.

Department of Energy, *supra*, in which the Court held that the federal government was not subject to punitive liability, is to the same effect. Congress, in the Clean Water Act, had waived the government's immunity from suit and authorized monetary "sanction[s]" against the federal government as "civil penalties" for violating the Act's federal-facilities provisions. 503 U.S. at 615, 620-627. The Court held, however, that the explicit waiver of sovereign immunity from monetary "sanctions," and Congress's use of "a seemingly expansive phrase like 'civil penalties arising under federal law,'" were not enough to prevent application of the

"rule of narrow construction." *Id.* at 626-627. To the contrary, application of that traditional rule led the Court to "take[] the waiver no further than" authorizing fines as sanctions to assure the government's prospective compliance. *Id.* at 627. The Court acknowledged the "unresolved tension" in the statutory scheme, which suggested that punitive sanctions may have been intended by Congress, but held that "under our rules"—with which "congressional familiarity" is presumed—"that tension is resolved by the requirement that any statement of waiver be unequivocal" and narrowly construed to favor the sovereign. *Id.* at 615, 626-627. See also *Missouri Pac. R.R.* v. *Ault*, 256 U.S. 554, 563-564 (1921) (applying principles of sovereign immunity, the Court construed the scope of a waiver of immunity for damages to be limited to compensatory damages, and not to include additional "double damages" for delayed payment).

Likewise, in *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680 (1983), the Court applied the canon of strict construction in addressing Congress's express waiver of sovereign immunity from attorney's fees in lawsuits brought under the Clean Air Act "whenever [a court] determines that such an award is appropriate." 42 U.S.C. 7607(f). The Court held that, notwithstanding Congress's waiver of immunity from suit and its clear authorization of some monetary relief, the term "appropriate" must be narrowly construed to prevent judicial enlargement of the available relief beyond what Congress clearly authorized. *Ruckelshaus*, 463 U.S. at 681-682, 685-686.

2. Petitioner's contention (Br. 24-26) that, once Congress opens the door to some monetary liability, courts are free to infer or imply broader monetary liability ignores the separation of powers principles that ani-

mate the rule of strictly construing congressional waivers of sovereign immunity. The power to waive sovereign immunity resides exclusively in the hands of Congress. Neither the Executive Branch nor the Judicial Branch can effect a waiver through the exercise of its respective powers. See *OPM* v. *Richmond*, 496 U.S. 414, 424-434 (1990); *United States* v. *Shaw*, 309 U.S. 495, 501-502 (1940). The Executive Branch's Article II powers and the Judicial Branch's Article III powers are "limited by a valid reservation of congressional control over funds in the Treasury." *OPM* v. *Richmond*, 496 U.S. at 425; see U.S. Const. Art. I, § 9, Cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."). This Court's strict construction of statutory waivers of immunity thus ensures that courts do not mistakenly impose burdens on the public fisc that Congress did not authorize, and that "public funds will be spent [only] according to the letter of the difficult judgments reached by Congress as to the common good." 496 U.S. at 428, 432; see also *INS* v. *St. Cyr*, 533 U.S. 289, 299 n.10 (2001) ("In traditionally sensitive areas, . . . the requirement of [a] clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.") (quoting *Gregory* v. *Ashcroft*, 501 U.S. 452, 461 (1991), and citing *Nordic Vill.*, *supra*).

For that reason, this Court has been "particularly alert to require a specific waiver of sovereign immunity before the United States may be held liable" for "monetary exactions." *United States* v. *Idaho*, 508 U.S. 1, 8-9 (1993). Accordingly, "[w]here a cause of action is authorized against the federal government, the available remedies are not those that are 'appropriate,'"

Lane, 518 U.S. at 197, or those that a court can plausibly infer from the statutory text, "but only those for which sovereign immunity has been expressly waived" by Congress itself, *ibid.* Accordingly, absent the clearest indications to the contrary, the Court should assume that "Congress had no intent to subject the United States to an enforcement mechanism that could deplete the federal fisc regardless of a responsible officer's willingness and capacity to comply in the future," and regardless of the fact that no individual suffered actual harm as a result of the government's improper conduct. *Department of Energy*, 503 U.S. at 628.[5]

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[5] The potential fiscal consequences of petitioner's argument cast that concern in stark relief. The Department of Labor's Office of Administrative Law Judges conducted over three thousand black-lung hearings between February 1995 and February 1997 (see 5 U.S.C. 552a(g)(5) (two-year statute of limitations for Privacy Act claims)). Virtually all of those hearings were preceded by the issuance of multi-captioned hearing notices to 15 to 20 claimants and to their attorneys, responsible employers, and insurance companies. See J.A. 9-10; C.A. App. 36, 59, 88, 143; Gov't Opp. to Pls.' Req. for Att'ys Fees 11-12. Indeed, petitioner asserted below that there were over 1.2 million individual violations per year and perhaps "tens of millions of violations" in total. 10/4/00 Aff. of J. Wolfe, Esq. 3. If, as petitioner contended below, each disclosure amounted to an independent violation of the Privacy Act—and if each such violation, in turn, gave rise to a right to recover $1000—the payment of automatic damages for each violation could amount to well in excess of $170 million. Cf. Gov't Opp. to Pls.' Req. for Att'ys Fees 12; see also Mem. in Opp. to Def.'s Supp. Summ. J. Mot. 17 (asserting that there would have been "approximately four to five million" Privacy Act violations).

While the United States disagrees that the $1000 minimum award is available for each violation of the Privacy Act—the better reading authorizes a minimum damages payment to each "person entitled to recovery" in a Privacy Act suit—that statutory construction question has not yet been definitively resolved.

Petitioner's reliance (Br. 25-26) on *Canadian Aviator, Ltd.* v. *United States*, 324 U.S. 215 (1945), and *American Stevedores, Inc.* v. *Porello*, 330 U.S. 446 (1947), is misplaced. Both cases involved construction of the terms of Congress's "broad statutory language authorizing suit" against the government under the Public Vessels Act, ch. 428, 43 Stat. 1112, to obtain damages caused by the negligent operation of public vessels by government employees. *Canadian Aviator*, 324 U.S. at 222. In *Canadian Aviator*, the Court declined to restrict an express waiver for "damages caused by a public vessel" to those damages that were caused by a collision involving such a vessel, holding that "Congressional adoption of broad statutory language authorizing suit was deliberate and is not to be thwarted by an unduly restrictive interpretation." *Ibid.* In *Porello*, the Court likewise construed the unqualified waiver of immunity for tort "damages" to reach both injury to property and injury to the person.

The instant suit, which involves large numbers of plaintiff class members each seeking the minimum $1000 recovery, is not unique. The federal Treasury faced exposure of over $100 billion in a Privacy Act class action that was certified to include over 100 million persons to whom the IRS mailed Form 1040 tax packages with mailing labels listing the recipient's name, address, and social security number. See *Ingerman* v. *IRS*, No. Civ.A.89-5396, 1990 WL 10029523 (D.N.J. July 16, 1990). The government currently faces potential liability in a pending suit against the Department of Veterans Affairs that seeks roughly $168 million ($1000 for each class member) for the Department's alleged disclosure of information and failure to establish appropriate safeguards to protect the security of such information in its computer system (5 U.S.C. 552a(b) and (e)(10)). See *Schmidt* v. *Department of Veterans Affairs*, No. 00-C-1093, 2003 WL 22346323 (E.D. Wis. Sept. 30, 2003), petition for permission to appeal denial of mot. for class certification pending, No. 03-8015 (7th Cir. filed Oct. 20, 2003).

330 U.S. at 450. In both cases, moreover, the Court stressed that the unqualified language used by Congress to effect the broad waiver had an established meaning at law. *Porello*, 330 U.S. at 450 (noting "historical[]" meaning of damages, "a fact too well-known to have been overlooked by the Congress"); *Canadian Aviator*, 324 U.S. at 224 (Congress used "customary legal terminology").[6]

Those cases thus stand for the unremarkable proposition that, when Congress's waiver of immunity is clear and unequivocal, the Court has no license to protect the public purse by narrowing the waiver's scope with judicially crafted, extra-textual limitations. The Privacy Act's calibrated and closely tailored civil remedial scheme, which specifies particular forms of injunctive relief for two types of claims, and only "actual damages" for the remaining claims, is the antithesis of the broad and unqualified waiver of immunity for "damages" at issue in *Canadian Aviator* and *Porello*.

West v. *Gibson*, 527 U.S. 212 (1999), does nothing to strengthen petitioner's hand. Contrary to petitioner's contention (Br. 25), *West* did not hold the canon of narrow construction to be inapplicable to determinations of the types of damages that Congress authorized to be paid out of the federal Treasury. *West* held only

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[6] The Public Vessels Act employed a broad waiver of immunity because Congress sought to equalize governmental and private liability for the same torts. *Canadian Aviator*, 324 U.S. at 218-219. See also *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990) (suits brought against the government under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, are subject to the same presumption of equitable tolling that applies to Title VII suits against private defendants). The present case, by contrast, involves the imposition of damages liability exclusively on the federal government.

that a clear waiver of immunity for "compensatory damages" applied to both the administrative and judicial phases of Title VII litigation against a federal agency. *Id.* at 222. The Court reached that decision because the statutory scheme at issue met the traditional "specially strict standard" of statutory construction. *Ibid.* While the Court suggested that the rule of narrow construction might not apply to subsidiary questions of "how [a] waived damages remedy is to be administered," *ibid.*, the Court did not resolve that issue and the language discussing it was dictum. In any event, that dictum has little relevance to the quintessential sovereign immunity question of whether a particular category of plaintiffs—that is, individuals whose rights under the Privacy Act are violated, but who have suffered no "actual damages"—are entitled to a monetary award from the federal Treasury at all.

B. The Statutory Text And Structure Restrict The Award Of $1000 To Persons Who Have Suffered Actual Damages

In light of the sovereign immunity rule of narrow construction, the question in this case is not whether the statutory text *could* be read to support an award of automatic damages, regardless of actual injury. The question is whether the statutory text *compels* that reading. The answer is no. To the contrary, a straightforward reading of the text of the Privacy Act's remedial provision restricts the award of $1000 to a claimant who has sustained "actual damages" and who thus is a "person entitled to recovery."

1. The statutory text provides that the government "shall be liable to the individual" whose rights were violated "in an amount equal to the sum of" two things: (A) "actual damages sustained by the individual," and

(B) costs and reasonable attorney fees. 5 U.S.C. 552a(g)(4). As petitioner appears to acknowledge (Br. 30-32), the term "actual damages" does not, in legal practice or common parlance, embrace the concept of liquidated damages or an automatic statutory payment regardless of actual harm. The follow-on clause in subparagraph (A), providing $1000 to a "person entitled to recovery," appears only after the statute has confined the remedy available to aggrieved individuals to "actual damages." The phrase is thus not logically or naturally read to disavow the very precondition to recovery—a showing of "actual damages"—that Congress just imposed. Instead, the structure of the sentence requires a plaintiff first to demonstrate some "actual damages sustained," and only then to become eligible for a minimum award of $1000.

That reading fully comports with the statement of congressional purpose in the Privacy Act, which expressed Congress's intent that federal agencies "be subject to civil suit for any damages *which occur* as a result of willful or intentional action which violates any individual's rights under th[e] Act." 5 U.S.C. 552a note (Pub. L. No. 93-579, § 2(b)(6), 88 Stat. 1896) (emphasis added). That statement stresses Congress's intent to provide a damages remedy for, and only for, losses which actually "occur."

2. That same understanding is consonant with Congress's use of the term "recovery" in conjunction with the "actual damages" requirement. The most common meaning of the term "recover" now, and at the time of the Privacy Act's enactment, is "to get or win back." *Webster's Third New Int'l Dictionary* 1898 (1966). That is precisely what actual damages do. They represent a "recovery" of money or resources lost due to the government's violation of the Privacy Act. By contrast, an

automatic statutory payment of damages would not reflect a "recovery" of anything; it would be a free-standing award of money. Such automatic awards are designed, in petitioner's own words (Br. 29), not to effectuate a "recovery," but to provide an "incentive to enforce the Act" and to "deter future agency violations." Thus, the phrase "person entitled to recovery" is most sensibly read as referring to a person "entitled to recover[]" actual damages, as opposed to a person who has demonstrated agency error but is not "recover[ing]" anything.[7]

Petitioner's contention (Br. 15-16) that the $1000 minimum award is itself the "recovery" to which he is "entitled" is anomalous in another respect as well. The phrase "person entitled to recovery" can meaningfully define eligibility for the $1000 minimum award only if an individual plaintiff's "entitle[ment] to recovery" can be determined without reference to the availability of the $1000 award itself. If the Act did not provide for such a minimum award, petitioner could not plausibly claim to be a "person entitled to recovery": petitioner has not challenged the court of appeals' holding that he failed to prove actual damages (Pet. App. 18a), and the Privacy Act does not provide for any other form of compensatory relief. Under petitioner's theory, however, it is precisely and only his purported eligibility for a $1000 award that makes him a "person entitled to recovery." That wholly circular argument overlooks that the

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[7] For example, a plaintiff who established the prerequisites for declaratory or injunctive relief would not naturally be characterized as a "person entitled to recovery"; a party does not "recover" an injunction or a declaratory judgment. Even though a declaratory or injunctive order might substantially benefit the plaintiff by reducing the likelihood of future violations, it would not represent a "recovery" because it would not compensate him for prior harms.

statutory text makes the payment of $1000 a *consequence* of being a "person entitled to recovery."

3. Congress's employment of the unique phrase "person entitled to recovery" reinforces that reading. Petitioner surmises (Br. 16) that the phrase "person entitled to recovery" refers to a plaintiff who has established an intentional or willful violation under Section 552a(g)(4) and the adverse effect required by Section 552a(g)(1)(D) as a prerequisite to suit. The Privacy Act's text demonstrates otherwise. Throughout the remedial provision, a plaintiff whose rights have been violated is referred to as an "individual," not a "person entitled to recovery." Indeed, Section 552a(g)(4) makes the government liable "to the individual" and requires the payment of actual damages sustained "by the individual." See also 5 U.S.C. 552a(g)(1)(A), (B), (C) and (D); 5 U.S.C. 552a(g)(2)(A). The phrase "person entitled to recovery" appears for the first and only time in the entire Act in the "actual damages" subparagraph of Section 552a(g)(4), and thus functionally serves to describe that particular class of individuals who have established some level of actual damages. When Congress "seemingly goes out of its way to avoid [a] standard term," employing in its place an "entirely novel phrase" or "neologism," the Court must give effect to that judgment. *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 537 (1994); see also *Department of Energy*, 503 U.S. at 619 ("Such differences in treatment within a given statutory text are reasonably understood to reflect differences in meaning intended."). To read "person entitled to recovery" as nothing more than the "individual" who establishes an adverse effect from intentional or willful conduct, as petitioner advocates, would ignore Congress's pointed use of distinct terminology.

4. Subparagraph (A) of Section 552a(g)(4) introduces the clause permitting an award of $1000 with the conjunction "but." As petitioner's cited authority explains, the word "but" "frequently means * * * 'except (that)' when used as a conjunction." *Fowler's Modern English Usage* 121 (R.W. Burchfield ed., 3d ed. 1996). When used in that manner, moreover, the exception refers back to the immediately preceding clause. See *ibid.* (providing illustrative examples). The guaranteed minimum recovery for a "person entitled to recovery" thus grammatically refers back to the "individual" identified at the opening of the subparagraph, who has sustained "actual damages." It does not, as petitioner argues (Br. 16), reach outside subparagraph (A) entirely and refer all the way back to the individual who has established an intentional or willful violation under the introductory clause in Section 552a(g)(4).

Petitioner stresses (Br. 16-17) that the word "but" is used as an adversative term limiting the operation of the "actual damages" provision. It certainly is. But that simply begs the question of what the payment of $1000 to a "person entitled to recovery" is meant to qualify—the obligation to show actual damages at all, or the obligation to quantify the actual damages sustained. That question is answered by the structure of the statutory provision. Congress itemized the two forms of relief it wished to allow under Section 552a(g)(4) in two distinct and separately set out subparagraphs—one for actual damages and one for costs and fees. Subparagraph (A) thus should be read as a self-contained, single remedial unit, designed to guarantee a minimum award for a person who sustains actual damages.

Given the structure adopted by Congress, it stands to reason that, if Congress wanted instead to add a third form of relief—automatic, statutory damages—it would

have done so through a third, self-contained and distinctly demarcated subparagraph. Indeed, that is what Congress has done in a number of other statutes, making clear its desire to ensure an award of purely statutory damages. In the Right to Financial Privacy Act of 1978, 12 U.S.C. 3401 *et seq.*, for example, Congress provided that federal agencies that improperly disclose financial records shall be "liable * * * in an amount equal to the sum of—(1) $100 * * *; [and] (2) any actual damages sustained * * *," 12 U.S.C. 3417(a), with the two subsections itemizing statutory and actual damages physically set off from each other in the statutory text. See also Electronic Communications Privacy Act of 1986, 18 U.S.C. 2520(c)(2) (allowing, in subsection (A), "actual damages," and separately in subsection (B), "statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000").

In other statutes, where Congress has not independently identified statutory damages as an element of relief in a separate subsection, Congress nevertheless has expressly denominated such an element of an award as "liquidated" or "statutory" damages. Provisions using those terms, moreover, do not restrict the availability of "liquidated" or statutory" damages to "persons entitled to recovery," and they typically contain other language making clear that the availability of "liquidated" or "statutory" damages does not depend upon proof of actual damages. See, *e.g.*, Electronic Communications Privacy Act of 1986, 18 U.S.C. 2520(c)(1)(A) (authorizing an award of "the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $50 and not more than $500"), 2520(c)(1)(B) (authorizing an award of "the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $100 and

not more than $1000"); Video Privacy Protection Act of 1988, 18 U.S.C. 2710(c)(2)(A) (authorizing an award of "actual damages but not less than liquidated damages in an amount of $2,500"); Driver's Privacy Protection Act of 1994, 18 U.S.C. 2724(b)(1) (authorizing an award of "actual damages, but not less than liquidated damages in an amount of $2,500"); Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. 248(c)(1)(B) (allowing plaintiff to elect "in lieu of actual damages, an award of statutory damages in the amount of $5,000 per violation"); Trademark Act of 1946, 15 U.S.C. 1117(c) (authorizing an award of "actual damages" or "statutory damages"), 1117(d) (authorizing plaintiff to elect receiving, "instead of actual damages and profits, an award of statutory damages in the amount of not less than $1,000 and not more than $100,000"); 17 U.S.C. 504(c)(1) (authorizing plaintiff to elect receiving "instead of actual damages and profits, an award of statutory damages"); Copyright Remedy Clarification Act, 17 U.S.C. 511(b) (allowing award of "actual damages and profits and statutory damages"); Semiconductor Chip Protection Act of 1984, 17 U.S.C. 911(c) (allowing plaintiff to elect, instead of "actual damages and profits as provided by subsection (b), an award of statutory damages for all infringements involved in the action"); Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. 1854(c)(1) (authorizing award of "actual damages, or statutory damages of up to $500 per plaintiff per violation").[8]

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[8] Other statutes referring to liquidated damages have used different formulations. See Privacy Protection Act of 1980, 42 U.S.C. 2000aa-6 (authorizing awards against the United States of "actual damages but not less than liquidated damages of $1,000"); Cable Communications Policy Act of 1984, 47 U.S.C. 551(f)(2)(A) (authorizing awards of "actual damages but not less than

Congress hewed to that same drafting pattern in other legislation safeguarding privacy rights at the time of the Privacy Act's enactment. See 18 U.S.C. 2520(a) (1970) (amended 1986) (authorizing "actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher"); 15 U.S.C. 1681n(1)-(3) (1970) (amended 1996) (structurally separating the different types of damages authorized).

In short, when Congress wishes to authorize statutory or liquidated damages, it does so plainly by referring specifically to "statutory" or "liquidated" damages, or otherwise structurally demarcating such damages as available separate and apart from actual damages. Moreover, in none of the statutes—either those contemporaneous with or those postdating the Privacy Act—did Congress employ the unique phrase "person entitled to recovery" to describe a party entitled to receive liquidated or statutory damages. As petitioner himself insists (see Br. 20-23), such evidence of consistent congressional practice is highly relevant to the interpretive question presented here. Accordingly, the presence in the Privacy Act of the phrase "person entitled to recovery"—and the absence of either a similar structure separately itemizing the $1000 award in its own subparagraph or using one of the descriptive phrases "liquidated damages" or "statutory damages"—speaks volumes.

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liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher"); Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. 1810(a) (authorizing the award of "actual damages, but not less than liquidated damages of $1,000 or $100 per day for each day of violation, whichever is greater"), 1828(1) (same).

In response, petitioner offers (Br. 20-21) a tax law that was repealed 21 years ago, 26 U.S.C. 7217(c) (Supp. II 1978) (repealed 1982), but petitioner's argument either proves nothing or proves our point. Section 7217 authorized suits against private persons and government officials in their *personal* capacities, see 26 U.S.C. 7217(a) (1976) and 7701(a)(1); *Vermont Agency of Natural Resources* v. *United States*, 529 U.S. 765, 780-781 & n.9 (2000), for the improper disclosure of tax return information. The damages provision, 26 U.S.C. 7217(c) (Supp. II 1978), employed language similar to that in the Privacy Act.[9] The existence of that now-repealed provision proves nothing, however, because its text was never authoritatively interpreted by this Court; nor was it analyzed by the courts of appeals with the care required for waivers of sovereign immunity because it did not authorize suit against the United States.[10] The repealed statutory language thus, at best,

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[9] The analogy is not perfect, however. Section 7217(c) consistently referred to the person receiving damages as the "plaintiff." It did not introduce (as the Privacy Act does) a new and distinct label, such as "person entitled to recovery," to describe the individual who had demonstrated actual damages.

[10] Neither *Johnson* v. *Sawyer*, 120 F.3d 1307 (5th Cir. 1997), nor *Rorex* v. *Traynor*, 771 F.2d 383 (8th Cir. 1985) (each cited at Pet. Br. 21), analyzed the text of Section 7217. *Johnson* stated in dicta that Section 7217 provided "liquidated damages of $1,000 per disclosure," but the court did not specifically consider whether that $1000 sum should be awarded in the absence of other damages, because that question had been resolved in district court, was not contested by the parties on appeal, and thus was law of the case. See 120 F.3d at 1313, 1325 n.6. The *Rorex* court stated that a "statutory minimum award of $1,000" was available under Section 7217 for unlawful disclosures where neither actual nor punitive damages were awarded, but it did so without any analysis of the statutory text. See 771 F.2d at 387-388.

raises the same question presented here; it does not answer it.

The evolution of Section 7217(c), in fact, proves our point. When Congress repealed Section 7217(c) and, instead, made the United States a defendant in such actions, Congress replaced the ambiguous actual damages provision with a new provision that follows the pattern identified above of structurally demarcating statutory damages as distinct from actual damages. See 26 U.S.C. 7431(c)(1) (subsection (A) permits the award of "$1,000 for each act of unauthorized inspection or disclosure," while subsection (B) authorizes "actual damages"). That change indicates Congress's understanding that the predecessor language in Section 7217(c) either did *not* authorize automatic statutory damages, or was sufficiently *unclear* as to require a clarifying amendment in order to impose monetary liability upon the United States. The successor law thus "illustrates Congress' ability to craft a clear waiver of the Federal Government's sovereign immunity against particular remedies for violations of the Act." *Lane*, 518 U.S. at 194. That clear language and structure are notably absent from the Privacy Act.[11]

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[11] Petitioner's reliance (Br. 22-23) on 18 U.S.C. 2707(c) suffers from the same problem, compounded by the fact that the statute does not apply to the United States, 18 U.S.C. 2707(a), and thus says nothing about whether the text is sufficiently clear to waive sovereign immunity for money damages. Petitioner's reliance on 26 U.S.C. 6110(j)(2)(A) is even farther afield, because the relevant statutory language provides that, upon establishing an intentional or willful violation, a "person" shall "be entitled to receive [no] less than the sum of $1,000." Relief is not restricted to a sub-class of "person[s]"—those "entitled to recovery" of actual damages. In any event, petitioner acknowledges (Br. 22) that "[n]o court has interpreted this provision."

5. Limiting damages payments to individuals who have demonstrated some actual harm from the government's violation of the Privacy Act promotes structural equity among the different remedial schemes authorized by Congress in the Privacy Act. Section 552a(g) includes three different remedial provisions. Section 552a(g)(2) authorizes a civil action for injunctive relief, costs, and attorney fees when an agency fails to amend or correct an individual's record. Section 552a(g)(3) likewise authorizes a civil action for injunctive relief, costs, and attorney fees when an agency fails to provide an individual with access to his record. Section 552a(g)(4) authorizes actual damages for certain violations of the Privacy Act's other requirements. In neither (g)(2) nor (g)(3) did Congress deem it necessary to authorize automatic monetary relief in order to provide an "incentive to enforce the Act" or to "deter future agency violations" (Pet. Br. 29). There is thus no reason to believe that Congress would have thought additional incentives or sanctions, beyond the award of actual damages, were necessary to enforce the other rights protected by the Privacy Act either. See *Memphis Comm. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 310 (1986) ("[D]amages that compensate for actual harm ordinarily suffice to deter constitutional violations."); *Carey* v. *Piphus*, 435 U.S. 247, 254-255 (1978) (the "cardinal principle of damages in Anglo-American law is that of *compensation* for" injury caused by a defendant's breach of duty).

6. Petitioner's textual arguments to the contrary fail. Petitioner first argues (Br. 13-15) that limiting recovery to actual damages (with a guaranteed minimum recovery of such damages) conflicts with the statutory text stating that the agency "shall be liable" whenever an intentional or willful violation is proven.

No such conflict exists. Congress did not establish liability in the air. It established liability only for "actual damages sustained." There is thus nothing counter-textual about requiring the plaintiff to show not just that the agency committed an intentional or willful violation of the Privacy Act, but also that he sustained actual damages. That is exactly what Congress commanded. If the Act had simply provided that "an agency that commits an intentional or willful violation shall be liable for actual damages," petitioner could not plausibly argue that the unavailability of any monetary award in cases where no actual damages were shown would somehow subvert Congress's determination that the agency "shall be liable." The fact that in the Privacy Act, individuals who have established some actual damages are also guaranteed a minimum award does not introduce incongruity; it simply eases or avoids quantification and other proof problems at trial. See Pet. Br. 12 (noting that the amount of damages can be "inherently difficult to quantify").

Petitioner next argues (Br. 17-18) that restricting damages awards under Section 552a(g)(4) to those persons who have shown actual harm would render "superfluous" the requirement in Section 552a(g)(1)(D) that plaintiffs demonstrate an "adverse effect" arising from the agency's failure to comply with the Privacy Act's terms as a prerequisite to suit. The required showing of an adverse effect, however, is not a remedial standard. It establishes the individual's standing to bring suit under the Privacy Act, just as it does under the Administrative Procedure Act, see 5 U.S.C. 702. See *Director, Office of Workers' Comp. Programs* v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 126 (1995) ("The phrase 'person adversely affected or aggrieved' is a term of art used in many statutes to

designate those who have standing to challenge or appeal an agency decision, within the agency or before the courts."); cf. S. Rep. No. 1183, 93d Cong., 2d Sess. 83 (1974) (describing function of Senate's "aggrieved person" language). The showing of an adverse effect demonstrates both the "injury in fact" and causation components of Article III standing, see *Vermont Agency*, 529 U.S. at 771 (discussing Article III standing requirements), and further demonstrates that the plaintiff's alleged injury falls within the "zone of interests" sought to be protected by the Privacy Act. See *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 883 (1990); *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 399-400 (1987).[12]

The type of threshold allegation or showing needed to bring suit at all is a far cry from the proof of actual damages needed to obtain monetary relief at the end of the lawsuit. Indeed, this Court's cases "firmly establish[]" that the "possibility that the [plaintiff's] averments might fail to state a cause of action on which [he] could actually recover" has no effect on the plaintiff's standing or the court's jurisdiction. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (quoting *Bell* v. *Hood*, 327 U.S. 678, 682 (1946)). For standing purposes, it is sufficient if a plaintiff establishes an injury in fact that is "fairly traceable" to the agency's allegedly unlawful action, that falls within the

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[12] The courts of appeals uniformly have held that the "adverse effect" requirement speaks to an individual's standing to bring suit under the Privacy Act. See Pet. App. 18a n.7; *Orekoya* v. *Mooney*, 330 F.3d 1, 7 (1st Cir. 2003); *Quinn* v. *Stone*, 978 F.2d 126, 135-136 (3d Cir. 1992); *Johnson* v. *Department of the Treasury, IRS*, 700 F.2d 971, 976-977 & n.9 (5th Cir. 1983); cf. *Albright* v. *United States*, 732 F.2d 181, 186 (D.C. Cir. 1984); *Parks* v. *IRS*, 618 F.2d 677, 682-683 & n.2 (10th Cir. 1980).

zone of interests protected by the Act, and that likely would be redressed if the plaintiff were to obtain "the requested relief" of actual damages. See *Steel Co.*, 523 U.S. at 103; see also *id.* at 96 (past injury is redressable "if the relief *requested*" is "money damages").

Petitioner argues lastly (Br. 18-19) that reading Section 552a(g)(4)(A) to permit money judgments against the United States only upon a showing of actual damages would create a potential "constitutional defect" in the law because it would permit the award of attorney's fees even if no actual damages were awarded. The notion that every statute authorizing monetary damages and attorney's fees is unconstitutional unless it guarantees that, at the end of the day, every plaintiff goes home with some damages payment is breathtakingly broad. It is also incorrect. As an initial matter, a plaintiff who fails to allege *any* basis for a damages recovery at the outset will lack standing to pursue a damages claim under Section 552a(g)(4) because he will have failed to satisfy the redressability prong of standing. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). In those circumstances, the individual would be limited to pursuing injunctive relief under the Administrative Procedure Act, 5 U.S.C. 706, to halt any ongoing agency violation of the Privacy Act (if he is able to demonstrate that he is affected adversely by the agency's practice, 5 U.S.C. 702; *City of Los Angeles* v. *Lyons*, 461 U.S. 95 (1983)). That, in fact, was the basis for the injunction issued, by consent, in this case.[13]

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[13] See Dist. Ct. Mem. Op. (Mar. 18, 1998); see also Office of Mgmt. & Budget, *Privacy Act Guidelines*, 40 Fed. Reg. 28,968 (1975) (individuals may pursue civil remedies for Privacy Act violations under 5 U.S.C. 552a(g) as well as "judicial review under other provisions of the Administrative Procedure Act"). Such a suit is permissible, notwithstanding the Privacy Act's independent remedial scheme, because the Privacy Act itself is part of the Administrative Procedure Act. The Privacy Act's provisions principally derive from the House bill (H.R. 16373, 93d Cong., 2d Sess. (1974)). Compare H.R. 16373, *supra*, and 120 Cong. Rec. 40,398-40,400 (1974), with *id.* at 40,400-40,405 (compromise text). The House Bill was designed to protect personal privacy "within the framework of the Freedom of Information Act (5 U.S.C. 552)," H.R. Rep. No. 1416, 93d Cong., 2d Sess. 2 (1974), which itself was enacted as an amendment to Section 3 of the Administrative Procedure Act (Act of June 11, 1946, ch. 324, § 3, 60 Stat. 238). See *Department of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 754 (1989). To do so, H.R. 16373 proposed amending Title 5 of the U.S. Code by inserting a Section 552a within the codified provisions of the Administrative Procedure Act immediately after the Freedom of Information Act. See H.R. Rep. No. 1416, *supra*, at 1, 27; Privacy Act of 1974, Pub. L. No. 93-579, §§ 3-4, 88 Stat. 1897-1905.

Beyond that, if the plaintiff alleges, but then ultimately fails to prove, any actual damages, he will not be entitled to attorney's fees. That is because the Privacy Act permits an award only of "reasonable" attorney's fees. 5 U.S.C. 552a(g)(4)(B). The most critical factor in determining the reasonableness of an attorney fee award is the degree of success obtained. See *Farrar* v. *Hobby*, 506 U.S. 103, 114-115 (1992). For a plaintiff who enjoys no success in prosecuting his claim, "the only reasonable fee" is "no fee at all." *Ibid.* ("only reasonable fee" for successful but nominal award "is usually no fee at all").

C. The Legislative History Of The Privacy Act, Congress's Overall Purpose, And Policy Considerations Confirm That Congress Did Not Authorize Any Damages Award For Plaintiffs Who Have Failed To Prove Actual Damages

Petitioner argues (Br. 29-31) that the Privacy Act's legislative history reveals a desire on Congress's part

to provide statutory damages to plaintiffs who have suffered no actual harm from the agency's violation. The short answer is that "the 'unequivocal expression' of elimination of sovereign immunity that [the Court] insist[s] upon is an expression in statutory text. If clarity does not exist there, it cannot be supplied by a committee report." *Nordic Vill.*, 503 U.S. at 37; see also *Lane*, 518 U.S. at 192 ("A statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text."). The long answer is that the legislative history "no more supports" petitioner's reading of the Privacy Act's damages provision "than does the statutory language itself." *Lehman*, 453 U.S. at 165.

1. Draft bills that expressly provided for liquidated damages and did not use the phrase "person entitled to recovery" were considered and rejected in both the House and the Senate. A direct predecessor to H.R. 16373, 93d Cong., 2d Sess. (1974), the amended provisions of which became the Privacy Act, specifically provided for liquidated damages. See H.R. 13872, 93d Cong., 2d Sess., § 552a(g)(1) (1974) (providing that any agency committing a violation of the act shall be liable in an amount equal to "actual and general damages but not less than liquidated damages computed at the rate of $1,000 for each" violation plus "punitive damages" where appropriate). That provision did not survive consideration by a subcommittee, and it was soon replaced by H.R. 16373, which provided only that the United States "shall be liable" for "actual damages sustained by the individual as a result of" a "willful, arbitrary, or capricious" violation. See H.R. 16373, *supra*, § 552a(g)(3) (Oct. 2, 1974) (as reported by committee); see also H.R. Rep. No. 1416, 93d Cong., 2d 11 (1974). The absence of any liquidated damages provision, moreover,

was not an oversight. Ten committee members expressly advocated that inclusion of a provision for "liquidated damages is essential" because "[a]ctual damages resulting from an agency's misconduct will, in most cases, be difficult to prove." *Id.* at 38 (Additional Views); see also 120 Cong. Rec. 36,645 (1974) (Rep. Abzug) (expressing the view that one of the "basic weaknesses" of H.R. 16373 was its failure to provide "liquidated" damages).

In the Senate as well, two bills that received specific consideration in committee provided for liquidated damages and had no limitation to "persons entitled to recovery." See S. 2810, 93d Cong., 1st Sess., § 7(c)(1) (1973) (agency liable for "any actual damages sustained by the individual aggrieved as a result of the * * * violation, but not less than liquidated damages of $100"); S. 3633, 93d Cong., 2d Sess., § 11(b)(1) (1974) (agencies liable for "any actual damages sustained by an individual plus $100 per violation"); see S. Rep. No. 1183, *supra*, at 3-4; 120 Cong. Rec. at 19,003, 23,450, 23,456 (Sen. Ervin); cf. S. 2963, 93d Cong., 2d Sess., § 308(e) (1974) (person aggrieved "shall be entitled to a $100 recovery for each violation plus actual and general damages"). Neither bill was reported out of committee.

2. The House-Senate compromise that resulted in passage of the Privacy Act reveals a congressional intent to proceed cautiously by permitting recovery only by individuals who sustained actual damages, while studying the need to permit additional forms of damages relief. The bill passed by the House permitted the award of "actual damages" only. See H.R. 16373, *supra*, § 552a(g)(3)(A) (Oct. 2, 1974) (as reported by committee); 120 Cong. Rec. at 36,976, 39,204, 40,398-40,400 (passage by full House on Nov. 21, 1974). The Senate bill, by contrast, authorized the award of both "actual

and general damages." See S. 3418, 93d Cong., 2d Sess., § 303(c) (Nov. 22, 1974) (as amended); 120 Cong. Rec. at 36,917-36,921 (passage by full Senate). The "general damages" provision likely derived from the common law tort of invasion of privacy, where "general damages" may be awarded as "presumed damages" without proof of harm.[14] After each bill was reported out of committee, President Ford expressed "enthusiastic support" for H.R. 16,373, *supra*, but expressed his view that S. 3418, *supra*, still required "major technical and substantive amendments." 120 Cong. Rec. at 34,838; see also *id.* at 36,892 (Sen. Ervin).[15]

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[14] See Restatement (First) of Torts § 621 cmt. a (1939) (defamation); *id.* § 867 cmt. d (privacy tort); *Johnson* v. *Department of Treasury, IRS*, 700 F.2d 971, 982 & n.31 (5th Cir. 1983); cf. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) (defamation).

[15] A memorandum (the origins of which are unclear) placed in the legislative record by Senator Ervin on the day that the Senate passed its version of the Privacy Act called for "a provision for liquidated damages of say $1,000." 120 Cong. Rec. at 36,891 (Sen. Ervin). No such "liquidated damages" provision ever appeared. See *id.* at 36,917, 36,921. Instead, the next day, the Senate passed an amendment to both the House and Senate bills that added a provision for "actual and general damages sustained by any person but in no case shall a person entitled to recovery receive less than the sum of $1,000." See H.R. 16373, *supra*, § 303(c)(1) (Nov. 22, 1974) (as passed by the Senate); see also 120 Cong. Rec. at 37,085 (Sen. Byrd) (amending engrossed Senate bill, S. 3418, *supra*). Petitioner contends (Br. 30) that the amendment must have been a response to the call in the memorandum submitted by Senator Ervin for liquidated damages. Because all prior Senate bills authorizing liquidated damages had explicitly identified the payments as "liquidated damages" or as "actual damages * * * plus" a specific dollar award, S. 2810, *supra*, § 7(c)(1); S. 3633, *supra*, § 11(b)(1); S. 2963, *supra*, § 308(e), consistent with the longstanding legislative practice discussed at pages 30-32, *supra*, the better reading of the amendment is that the "person entitled to recovery" of $1000 was the person who had proven actual or general damages. In any event, never-enacted language that simply "provides an unanswered question" does not suffice to demonstrate that the "law is clear." *BFP*, 511 U.S. at 547.

With the 93d Congress drawing to a close, the members of the committees that reported the bills determined that there was not sufficient time to "resolve the complex differences between the two bills in a conference committee." 120 Cong. Rec. at 40,880.[16] Proceeding through a process of informal compromise, members of the two committees agreed to "retain the basic thrust of the House version," but also to "include important segments of the Senate measure." *Ibid.* That compromise eliminated the authorization for general or "presumed" damages and, instead, created a Privacy Protection Study Commission to study and report back to Congress on provisions "not included in the compromise" bill, including "whether the Federal government should be [made] liable for general damages." *Id.* at 40,881; see also Privacy Act of 1974, Pub. L. No. 93-579, § 5(c)(2)(B)(iii), 88 Stat. 1907. That approach was consistent with Congress's final determination, given the press of time, to proceed cautiously by enacting a law containing basic, broadly agreed-upon protections for privacy, while leaving other more controversial matters for further study and debate. See Privacy Protection Study Comm'n, *Personal Privacy in an Information*

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[16] The congressional proponents of a broader bill were under considerable pressure to defer their more controversial provisions. Had Congress failed to reach a compromise in the few remaining weeks after its Thanksgiving recess, it was understood that President Ford planned to issue an executive order "nearly identical" to the House bill, but containing no civil remedies at all, and, by doing so, to "steal the thunder" of privacy reform from the Congress. See 120 Cong. Rec. at 35,763; *id.* at 36,644 (Rep. Moorhead).

Society: Report of the Privacy Protection Study Commission 530 (1977) (Congress "restrict[ed] recovery [under the Act] to specific pecuniary losses until the Commission could weigh the propriety of extending the standard of recovery.").[17] Petitioner's effort to obtain the very type of automatic damages payment for which Congress deferred consideration, due to the controversy surrounding that form of relief, thus ignores the legislative compromise that brought the Privacy Act into being.[18]

3. Petitioner argues (Br. 27) that allowing automatic damages would help "fulfill[] the Act's purpose[]" of protecting privacy. Perhaps so, but an argument based on "policy, no matter how compelling, is insufficient, standing alone, to waive [sovereign] immunity." *Library of Congress*, 478 U.S. at 321. Beyond that, "no legislation pursues its purposes at all costs," and "[d]eciding what competing values will or will not be

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[17] See also 120 Cong. Rec. at 36,895 (Sen. Percy) ("This bill is certainly not the final word on privacy. There will be additional laws needed to solve particular problems * * *. But this bill is a historic beginning."); *id.* at 36,967 (Rep. Moorhead) ("It is not a perfect bill: But it is a start and an important first step in the right direction."); *ibid.* (Rep. Holifield) ("It may not be as complete as some would want."); *Privacy Act of 1974: Statement by the President upon Signing the Bill into Law*, 11 Weekly Comp. Pres. Doc. 8 (Jan. 1, 1975) (noting that there will be "continuing legislative and executive efforts to reassess the proper balance between the privacy interests of the individual and those of society").

[18] Indeed, even though it was the Senate that pressed for the most generous damages relief, the Senate itself rejected liquidated damages provisions of only $100. See S. 2810, *supra*, § 7(c)(1); S. 3633, *supra*, § 11(b)(1). It thus is implausible that a compromise with the more fiscally restrictive House version of the legislation would produce a liquidated damages provision *ten times* what the Senate itself had refused to enact.

sacrificed to the achievement of a particular objective is the very essence of legislative choice." *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) (per curiam). To "assume that *whatever* furthers the statute's primary objective must be the law" "frustrates rather than effectuates legislative intent" by failing to reserve for Congress the difficult trade-offs inherent in nearly all legislative decisions. *Id.* at 526; see also *Newport News*, 514 U.S. at 136 ("Every statute proposes, not only to achieve certain ends, but also to achieve them by particular means—and there is often a considerable legislative battle over what those means ought to be.").[19]

The legislative history, in fact, documents that, in considering the competing remedial provisions before it, Congress did not proceed with a single-minded focus on encouraging Privacy Act litigation, to the exclusion of the fiscal consequences attending the authorization of broad damages awards:

> [W]e are trying to balance two great interests here. We are trying to balance the necessity of balancing

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[19] Even though relief is restricted to those who have suffered actual damages, the monetary remedies provided by the Privacy Act are not parsimonious compared with the remedies available for other statutory violations. The Administrative Procedure Act, which provides the usual basis for challenging federal agency action, specifically excludes "money damages" from the available forms of relief. 5 U.S.C. 702. In suits against the United States, the availability of retrospective monetary relief is therefore the exception rather than the rule. To permit monetary awards even without proof of actual damages would be more unusual still. Though Congress has, on occasion, authorized such awards (see p. 34, *supra*), a decision to do so cannot be said to follow naturally or typically from Congress's decision to prohibit particular agency conduct.

> the budget, and we are trying to protect the Government from undue liability.
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> I think it is wrong to make the Government of the United States and this congressional budget subject to an absolutely incalculable amount of liquidated damages. If we had a hundred lawsuits and if we had a hundred verdicts of $1 million each, there would be no guarantee that this Congress could protect itself against that liability.

120 Cong. Rec. at 36,659 (Rep. McCloskey) (commenting on an amendment to authorize punitive damages); see also *id.* at 36,956 (Rep. Erlenborn) (opposing an amendment that would have provided damages for any violation of the Act because it "expose[d] the Government to undue liability" which "[w]e just cannot afford"); *id.* at 36,659 (Rep. McCloskey) ("[I]s it not true that there would be no way of ascertaining in advance of any one year, when this Congress is ascertaining the budget, what might possibly be the amount of damages that might be awarded?"); *id.* at 36,644 (Rep. Moorhead) ("We have tried to tailor this bill so that it will protect individual rights and at the same time permit the Government to operate responsibly and perform its functions without unjustifiable impediments.").

The remedial text that Congress ultimately enacted —which includes no reference to "general," "liquidated," "statutory," or "presumed" damages—reflects that compromise by limiting monetary recoveries to those who have sustained "actual damages," while at the same time providing those same persons a guaranteed minimum award. That minimum guarantee, in turn, obviates the proof difficulties that frequently arise in quantifying damages precisely, streamlines the proof of multiple, minor damages claims, and provides an

incentive to prove the existence of actual damages even when they are small in amount.

In short, the legislative history makes clear that, when Members of Congress favored some form of automatic damages payment, they said so explicitly. The history also reveals that such provisions were controversial because of their budgetary implications. The resulting compromise bill enacted the remedies provision on which there was common ground—one allowing "actual damages"—and deferred to a later day the consideration of other types of damages. Petitioner's reading of the statutory language thus attempts to obtain through judicial interpretation what was lost in the inevitable "give-and-take of the legislative process." *Bell* v. *Maryland*, 378 U.S. 226, 317 (1964) (Goldberg, J., concurring).

4. Finally, petitioner invokes (Br. 33-34) the Office of Management and Budget's Privacy Act Guidelines in support of his broad reading of the damages provision. The Privacy Act charges the Office of Management and Budget (OMB) to "develop and, after notice and opportunity for public comment, prescribe guidelines and regulations for the use of agencies in implementing the provisions of [the Privacy Act]," and to "provide continuing assistance to and oversight of the implementation of [the Privacy Act] by agencies." 5 U.S.C. 552a(v). Guidelines issued by OMB in 1975 state that an agency will be required to pay "[a]ctual damages or $1,000, whichever is greater," when it is found to have committed an intentional or willful violation of the provisions of the Privacy Act for which an actual damages award is permitted. 40 Fed. Reg. at 28,970.

OMB has informed this Office that, in recognition of the principle that waivers of sovereign immunity must be strictly construed, OMB does not interpret its

Guideline to require the payment of $1000 to plaintiffs who have sustained no actual damages from a violation of the Act. Furthermore, even if the relevant Guideline provision unambiguously supported petitioner's position, it would not be entitled to judicial deference, because it concerns a provision of the Act that is administered solely by the courts, not by OMB or any other federal agency. See *Adams Fruit Co.* v. *Barrett*, 494 U.S. 638, 649-650 (1990).

More importantly, OMB's Guidelines are irrelevant to the sovereign immunity question before this Court. Any waiver of sovereign immunity must be clearly and unequivocally expressed in the statutory text. *Nordic Vill.*, 503 U.S. at 33, 37. If the text is clear, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984). If the statutory text is ambiguous and susceptible of competing interpretations, then the canon of narrow construction of waivers of sovereign immunity dictates that immunity is not waived. *Nordic Vill.*, 503 U.S. at 37. OMB could not, through the issuance of interpretative guidance, effect a waiver of sovereign immunity that Congress did not unambiguously enact. See *OPM* v. *Richmond*, 496 U.S. at 424-434 (Executive Branch official cannot bind government to monetary payment absent congressional appropriation); *Shaw*, 309 U.S. at 501. The Privacy Act's text contains no unambiguous authorization for statutory or liquidated damages absent proof of actual damages, and that is the end of the matter.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX A

Section 552a of Title 5, United States Code, provides in pertinent part as follows:

Records maintained on individuals

(a) DEFINITIONS.—For purposes of this section—

(1) the term "agency" means agency as defined in section 552(e) of this title;

(2) the term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence;

(3) the term "maintain" includes maintain, collect, use, or disseminate;

(4) the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

(5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;

(6) the term "statistical record" means a record in a system of records maintained for statistical research or reporting purposes only and not used in

whole or in part in making any determination about an identifiable individual, except as provided by section 8 of title 13;

(7) the term "routine use" means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected;

* * * * *

(b) CONDITIONS OF DISCLOSURE.—No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—

(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

(2) required under section 552 of this title;

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;

(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) to the National Archives and Records Administration as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Archivist of the United States or the designee of the Archivist to determine whether the record has such value;

(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office;

(11) pursuant to the order of a court of competent jurisdiction; or

(12) to a consumer reporting agency in accordance with section 3711(e) of title 31.

* * * * *

(d) ACCESS TO RECORDS.—Each agency that maintains a system of records shall—

(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

(2) permit the individual to request amendment of a record pertaining to him and—

(A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and

(B) promptly, either—

(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or

(ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head

of the agency, and the name and business address of that official;

(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section;

(4) in any disclosure, containing information about which the individual has filed a statement of disagreement, occurring after the filing of the statement under paragraph (3) of this subsection, clearly note any portion of the record which is disputed and provide copies of the statement and, if the agency deems it appropriate, copies of a concise statement of the reasons of the agency for not making the amendments requested, to persons or other agencies to whom the disputed record has been disclosed; and

(5) nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

(e) AGENCY REQUIREMENTS.—Each agency that maintains a system of records shall—

(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;

(2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs;

(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual—

(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

(B) the principal purpose or purposes for which the information is intended to be used;

(C) the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection; and

(D) the effects on him, if any, of not providing all or any part of the requested information;

(4) subject to the provisions of paragraph (11) of this subsection, publish in the Federal Register upon establishment or revision a notice of the existence and character of the system of records, which notice shall include—

(A) the name and location of the system;

(B) the categories of individuals on whom records are maintained in the system;

(C) the categories of records maintained in the system;

(D) each routine use of the records contained in the system, including the categories of users and the purpose of such use;

(E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;

(F) the title and business address of the agency official who is responsible for the system of records;

(G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;

(H) the agency procedures whereby an individual can be notified at his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its content; and

(I) the categories of sources of records in the system;

(5) maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;

(6) prior to disseminating any record about an individual to any person other than an agency, unless

(B) the categories of individuals on whom records are maintained in the system;

(C) the categories of records maintained in the system;

(D) each routine use of the records contained in the system, including the categories of users and the purpose of such use;

(E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;

(F) the title and business address of the agency official who is responsible for the system of records;

(G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;

(H) the agency procedures whereby an individual can be notified at his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its content; and

(I) the categories of sources of records in the system;

(5) maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;

(6) prior to disseminating any record about an individual to any person other than an agency, unless

or intended use of the information in the system, and provide an opportunity for interested persons to submit written data, views, or arguments to the agency; and

(12) if such agency is a recipient agency or a source agency in a matching program with a non-Federal agency, with respect to any establishment or revision of a matching program, at least 30 days prior to conducting such program, publish in the Federal Register notice of such establishment or revision.

(f) AGENCY RULES.—In order to carry out the provisions of this section, each agency that maintains a system of records shall promulgate rules, in accordance with the requirements (including general notice) of section 553 of this title, which shall—

(1) establish procedures whereby an individual can be notified in response to his request if any system of records named by the individual contains a record pertaining to him;

(2) define reasonable times, places, and requirements for identifying an individual who requests his record or information pertaining to him before the agency shall make the record or information available to the individual;

(3) establish procedures for the disclosure to an individual upon his request of his record or information pertaining to him, including special procedure, if deemed necessary, for the disclosure to an individual of medical records, including psychological records, pertaining to him;

(4) establish procedures for reviewing a request from an individual concerning the amendment of any record or information pertaining to the individual, for

making a determination on the request, for an appeal within the agency of an initial adverse agency determination, and for whatever additional means may be necessary for each individual to be able to exercise fully his rights under this section; and

(5) establish fees to be charged, if any, to any individual for making copies of his record, excluding the cost of any search for and review of the record.

The Office of the Federal Register shall biennially compile and publish the rules promulgated under this subsection and agency notices published under subsection (e)(4) of this section in a form available to the public at low cost.

(g)(1) CIVIL REMEDIES.—Whenever any agency

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

(B) refuses to comply with an individual request under subsection (d)(1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

(2)(A) In any suit brought under the provisions of subsection (g)(1)(A) of this section, the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(3)(A) In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner

which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of—

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to September 27, 1975.

* * * * *

(i)(1) CRIMINAL PENALTIES.—Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this

section or by rules or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $5,000.

(2) Any officer or employee of any agency who willfully maintains a system of records without meeting the notice requirements of subsection (e)(4) of this section shall be guilty of a misdemeanor and fined not more than $5,000.

(3) Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than $5,000.

* * * * *

(v) OFFICE OF MANAGEMENT AND BUDGET RESPONSIBILITIES.—The Director of the Office of Management and Budget shall—

(1) develop and, after notice and opportunity for public comment, prescribe guidelines and regulations for the use of agencies in implementing the provisions of this section; and

(2) provide continuing assistance to and oversight of the implementation of this section by agencies.

APPENDIX B

The Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896 (reproduced in part at 5 U.S.C. 552a note), provides in pertinent part as follows:

SEC. 2 (a) The Congress finds that—

(1) the privacy of an individual is directly affected by the collection, maintenance, use, and dissemination of personal information by Federal agencies;

(2) the increasing use of computers and sophisticated information technology, while essential to the efficient operations of the Government, has greatly magnified the harm to individual privacy that can occur from any collection, maintenance, use, or dissemination of personal information;

(3) the opportunities for an individual to secure employment, insurance, and credit, and his right to due process, and other legal protections are endangered by the misuse of certain information systems;

(4) the right to privacy is a personal and fundamental right protected by the Constitution of the United States; and

(5) in order to protect the privacy of individuals identified in information systems maintained by Federal agencies, it is necessary and proper for the Congress to regulate the collection, maintenance, use, and dissemination of information by such agencies.

(b) The purpose of this Act is to provide certain safeguards for an individual against an invasion of

personal privacy by requiring Federal agencies, except as otherwise provided by law, to—

(1) permit an individual to determine what records pertaining to him are collected, maintained, used, or disseminated by such agencies;

(2) permit an individual to prevent records pertaining to him obtained by such agencies for a particular purpose from being used or made available for another purpose without his consent;

(3) permit an individual to gain access to information pertaining to him in Federal agency records, to have a copy made of all or any portion thereof, and to correct or amend such records;

(4) collect, maintain, use, or disseminate any record of identifiable personal information in a manner that assures that such action is for a necessary and lawful purpose, that the information is current and accurate for its intended use, and that adequate safeguards are provided to prevent misuse of such information;

(5) permit exemptions from the requirements with respect to records provided in this Act only in those cases where there is an important public policy need for such exemption as has been determined by specific statutory authority; and

(6) be subject to civil suit for any damages which occur as a result of willful or intentional action which violates any individual's rights under this Act.

* * * * *

SEC. 5. (a)(1) There is established a Privacy Protection Study Commision (hereinafter referred to as the

"Commission" which shall be composed of seven members as follows:

(A) three appointed by the President of the United States,

(B) two appointed by the President of the Senate, and

(C) two appointed by the Speaker of the House of Representatives.

* * * * *

(b) The Commission shall—

(1) make a study of the data banks, automated data processing programs, and information systems of governmental, regional, and private organizations, in order to determine the standards and procedures in force for the protection of personal information; and

(2) recommend to the President and the Congress the extent, if any, to which the requirements and principles of section 552a of title 5, United States Code, should be applied to the information practices of those organizations by legislation, administrative action, or voluntary adoption of such requirements and principles, and report on such other legislative recommendations as it may determine to be necessary to protect the privacy of individuals while meeting the legitimate needs of government and society for information.

* * * * *

(c) * * *

(2) * * *

(B) The Commisson shall include in its examination a study of—

* * * * *

(iii) whether the Federal Government should be liable for general damages incurred by an individual as the result of a willful or intentional violation of the provisions of sections 552a(g)(1)(C) or (D) of title 5, United States Code[.]

* * * * *

SEC. 7. (a)(1) It shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number.

(2) the provisions of paragraph (1) of this subsection shall not apply with respect to—

(A) any disclosure which is required by Federal statute, or

(B) the disclosure of a social security number to any Federal, State, or local agency maintaining a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual.

(b) Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that in-

dividual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.

GRANTED

(10)

No. 02-1377

NOV 14 2003

IN THE

Supreme Court of the United States

BUCK DOE,

Petitioner,

v.

ELAINE L. CHAO, SECRETARY OF LABOR,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Petitioner demonstrated in his opening brief that Section 552a(g)(4) of the Privacy Act awards $1,000 statutory damages to an individual who has proven an "adverse effect" caused by a federal agency's "intentional or willful" failure to comply with the Act. This award is not conditioned on the individual's quantifying harm in terms of "actual damages." The Privacy Act's plain text, structure, context, purpose, history, and relevant administrative guidance compel this interpretation. The government does not cast any reasonable doubt on this showing. In fact, much of the government's response proceeds from mischaracterizations of Petitioner's arguments.

1. **Accepting Petitioner's interpretation of the Privacy Act would not create an "automatic" remedy that is unconnected to any "actual harm."** The government attempts to deflect attention from the analytical weaknesses in its position by repeatedly urging that acceptance of Petitioner's interpretation of the Privacy Act would create a radical "automatic" remedy unconnected to any "actual harm."[1] This assertion is untrue.

There is nothing "automatic" about a $1,000 statutory damages award under Petitioner's interpretation of the Act. Plaintiffs complaining of a wrongful disclosure must, in every case, prove an "adverse effect" caused by a violation of the Act. They must also, in every case, prove that the statutory violation was "intentional or willful" — a barrier that Congress and commentators agree is a formidable obstacle to recovery under the Act. *See* Pet. Br. 29.

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[1] *See* Resp. Br. 9, 10, 12, 13, 14, 15, 16, 17, 22 n.5, 25, 26, 27, 29, 34, 35, 44, 47 (asserting that Petitioner seeks "automatic" damages awards); *id.* at 22, 26, 35, 36, 40, 42 (asserting that Petitioner seeks damages awards unconnected to "actual harm").

It is also untrue that Petitioner's interpretation of the Act would award $1,000 to plaintiffs who have suffered no "actual harm." The government is strategically conflating two separate ideas — "actual harm" and "actual damages." "Because harm differs from damages in nature as well as in amount, the term damages is best reserved for the claim or the remedy rather than for the underlying loss or injury." 1 D. Dobbs, *Law of Remedies* § 3.1 (2d ed. 1993). As this Court has held in the context of defamation claims, "[s]uffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted . . . include . . . personal humiliation, and mental anguish and suffering." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). Precisely the same is true of privacy invasions caused by public disclosure of private facts. *See* D. Elder, *The Law of Privacy* § 3:7 (1991) ("Clearly, the protected interest in public disclosure cases is that of reputation, with the same overtones of mental distress that are present in libel and slander . . . .") (citation omitted). *Accord Time, Inc. v. Hill*, 385 U.S. 374, 384 n.9 (1967); 2 Dobbs, *supra*, § 7.1.1.

Every person who files a Privacy Act suit for wrongful disclosure must prove "actual harm." He must demonstrate that he suffered an "adverse effect," which, in the great majority of cases, is likely to be emotional distress. *See* Pet. Br. 27-28, 31-32. To be sure, it is often difficult to quantify this harm in the monetary terms of "actual damages." *See* Pet. Br. 28 & n.6. But difficulty in quantification does not mean that "actual harm" has not been suffered.

In sum, there is nothing radical about an interpretation of the Privacy Act that awards the relatively meager sum of $1,000 to a person who has suffered real harm (an "adverse effect") as a result of an agency's "intentional or willful" violation of federal law.

2. **The United States has clearly waived its immunity to a $1,000 statutory damages remedy under the Privacy Act.** It is telling that the government's primary argument is not that its interpretation of the Privacy Act is the correct one, but rather that this Court should strain to accept that interpretation in service to a sovereign immunity canon of construction. This argument fails for two reasons.

a. *First*, the sovereign immunity canon is not a license to give a statute a strained reading. *See* Pet. Br. 23-24. A rule of strict construction is not a rule of first resort. It is a means of resolving residual ambiguity once ordinary interpretive guides have yielded no definitive conclusion. *See Citizens' Bank v. Parker*, 192 U.S. 73, 85-86 (1904) (a rule of strict construction "is not a substitute for all other rules"; it is "to be an element in decision, and effective, maybe, when all other tests of meaning have been employed which experience has afforded, and which it is the duty of courts to consider when rights are claimed under statute"). *Accord, e.g.*, 3 N. Singer, *Sutherland Statutory Construction*, § 58:2 (6th ed. 2001); T. Sedgwick, *The Interpretation and Construction of Statutory and Constitutional Law* 218-19 (2d ed. 1874). Thus, the fact that a statute waives the United States' sovereign immunity does not mean that the Court should ignore rules of construction like giving words their plain meaning, ensuring that each word of a statute is given effect, and interpreting a statute as a whole. As demonstrated in Petitioner's opening brief and again below, the government's interpretation of the Privacy Act violates these most basic rules.

b. *Second*, the question in this case is not whether the United States has waived its immunity to a $1,000 statutory damages remedy. It plainly has done so. The question is whether a Privacy Act plaintiff must quantify some measure of actual damages to receive the $1,000. The sovereign immunity canon of construction does not reach down to govern this subsidiary question of the Act's operation and

administration. To the contrary, the Court will not "thwart[]" the waiver of immunity with an "unduly restrictive interpretation." *Canadian Aviator, Ltd. v. United States*, 324 U.S. 215, 222 (1945). *See* Pet. Br. 25-26.

The government's case law does not suggest anything to the contrary. In each case, the Court unremarkably refused to find the United States subject to a remedy that a statute's plain text, structure, and context did not create. *See Price v. United States*, 174 U.S. 373, 376-77 (1899) (refusing to allow damages for property that the claimant admitted was "not taken or destroyed" by Indians based on a statute that expressly limited the United States' liability to damages for property "taken or destroyed" by Indians); *United States Dep't of Energy v. Ohio*, 503 U.S. 607, 616-26 (1992) (United States not liable for punitive fines under the Clean Water Act or Resource Conservation Recovery Act where neither plain text nor structure nor context of the Acts created such liability); *Missouri Pac. R. Co. v. Ault*, 256 U.S. 554, 563 (1921) (United States not liable for penalties imposed under Arkansas railroad workers law where there was "nothing either in the purpose or the letter" of the federal statute governing railroad takeover "to indicate Congress intended to authorize suit against the government for a penalty"); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 682, 693-94 (1983) (United States not liable for attorneys' fees under the Clean Air Act where a party "achieved no success on the merits of its claims"; Court refused a "radical departure from established principles requiring that a fee claimant attain some success on the merits before it may receive an award of fees").

3. **The government's textual arguments fail at every turn.** Section 552a(g)(4)(A) provides for liability in the amount of "actual damages sustained as a result of the [government's] refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000 . . . ." The government argues that this language "confine[s] the

remedy available to aggrieved individuals to 'actual damages.'" Resp. Br. 26. But this "confining" characterization only begs the question of whether quantification of "actual damages" is a precondition to recovery of $1,000 statutory damages. And the government's attempts to answer this question in the affirmative fail at every turn.

a. The most fundamental flaw in the government's position is that it renders the "adverse effect" element of the Privacy Act superfluous. This is almost certainly the reason that the government has restated the question presented to eliminate any reference to the "adverse effect" requirement and has studiously avoided mention of that requirement when inaccurately characterizing Petitioner's argument as seeking "automatic" damages awards that are unconnected to "actual harm." *See supra* pp. 1-2.

The government ascribes a standing function to the "adverse effect" requirement. Resp. 36-37. Petitioner agrees that, as an essential element of a Section 552a(g)(4) claim, the "adverse effect" requirement serves a standing function. But if the government's interpretation of the Act is accepted, that requirement becomes superfluous. This is so because the government's central contention is that proof of "actual damages" is a necessary claim element. Thus, to survive a motion to dismiss, a plaintiff would have to allege sufficient facts to support a claim for "actual damages." Supportable allegations of this sort would necessarily satisfy the standing doctrine's "distinct and palpable" injury, "causation," and "redressability" requirements. *See Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). The "injury in fact" and "causation" functions that the government attributes to the "adverse effect" requirement (Resp. Br. 37) would be subsumed in every case by the need to allege, and ultimately prove, "actual damages." *See* Pet. Br. 17.

Moreover, the government's position fails to answer the fundamental question of why Congress would grant standing to bring suit under the Act to an individual who suffers an "adverse effect" caused by an "intentional or willful" violation, yet provide no remedy for that injury. Unable to offer an answer, the government instead asserts (Resp. Br. 38-39 & n.13) that, in such circumstances, the plaintiff could bring an action for injunctive relief under the Administrative Procedure Act. This is no answer for two reasons.

First, once an individual's private information has been wrongfully disclosed, the harm is done. An injunction forbidding an agency from redisclosing the private information in the future would be a singularly ineffective remedy for that harm. *See White v. Sparkill Realty Corp.*, 280 U.S. 500, 510 (1930) ("injunction . . . ceased to be appropriate" where "all alleged wrongful acts . . . had been consummated long before suit was brought"); 42 Am. Jur. 2d *Injunctions* § 2 (2000) ("[R]ights already lost and wrongs already perpetrated cannot be corrected by injunction.").

Second, there is no independent APA claim for a Privacy Act disclosure violation. As courts repeatedly have held, Section 552(a)(g)(4) provides the exclusive remedies for a wrongful disclosure of private information by a federal agency, and injunctive relief is not one of them.[2] The APA confers no "authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is

[2] *See, e.g., Hastings v. Judicial Conference of the U.S.*, 770 F.2d 1093, 1104 (D.C. Cir. 1985); *Cell Assocs., Inc. v. NIH*, 579 F.2d 1155,1159 (9th Cir. 1978); *Parks v. IRS*, 618 F.2d 677, 684 (10th Cir. 1980); *Hanley v. United States Dep't of Justice*, 623 F.2d 1138, 1139 (6th Cir. 1980); *Clarkson v. IRS*, 678 F.2d 1368, 1375 n.11 (11th Cir. 1982). *See generally National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) ("[W]hen legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies.").

sought." 5 U.S.C. § 702; *see id.* § 704 (APA allows review of an agency action only where "there is no other adequate remedy in a court."). Accordingly, a plaintiff cannot bring a claim under the APA for what is, in reality, a Privacy Act disclosure violation. *See, e.g., Tripp v. Department of Defense*, 193 F. Supp. 2d 229, 238 (D.D.C. 2002); *Schaeuble v. Reno*, 87 F. Supp. 2d 383, 394 (D.N.J. 2000); *Mittleman v. United States Treasury*, 773 F. Supp. 442, 449 (D.D.C. 1991).[3]

b. The Privacy Act states that the United States "shall be liable" to a Privacy Act plaintiff who proves an "adverse effect" caused by an "intentional or willful" violation. *See* Pet. Br. 14-15. The government counters that "[i]f the Act had simply provided that 'an agency that commits an intentional or willful violation shall be liable for actual damages,'" then Petitioner could not "argue that the unavailability of any monetary award in cases where no actual damages were shown would somehow subvert Congress's determination that the agency 'shall be liable.'" Resp. Br. 36. The defect in this response is that Congress did not use the language that the government offers.

[3] The government states (Resp. Br. 38 & n.13) that the APA was "the basis" for an injunction against the Department in the district court below. This characterization is misleading. The Department voluntarily agreed to cease disclosing black-lung claimants' social security numbers shortly after Petitioner filed suit, and the district court entered a consent order embodying that agreement. *See* JA 12-13. The Department later sought to renege, claiming that the district court lacked jurisdiction to enforce the agreement. In rejecting the Department's arguments, the district court discussed the APA as a "proper consideration" in its enforcement power. Op. of March 18, 1998 at 10. Ultimately, however, the district court held that its power to enter and enforce the consent order stemmed from "the Department's own conduct in this case." *Id.* at 14. *See United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 238 (1975) ("[A] consent decree or order is to be construed for enforcement purposes basically as a contract . . . .").

Congress instead provided that "the United States shall be liable to the individual *in an amount equal to the sum of*" the figures obtained from operation of Sections 552a(g)(4)(A) and (B). (emphasis added). This is language of measurement and arithmetic, not language creating an additional element of a cause of action. The government's insistence that "actual damages" is an essential element of liability under Section 552a(g)(4) — despite its being set off from the elements of liability in the Act's civil remedies provisions and preceded by mandatory language imposing liability — is nonsensical. Why would Congress have used the "amount equal to the sum of" phraseology if it expected that the "sum" would frequently be zero? As the government itself suggests, it would have been far simpler to say that the United States "shall be liable for actual damages."

Finally, the government does not dispute Petitioner's showing (Pet. Br. 32) that proof of actual damages is not an essential element of common-law intentional torts generally or privacy torts specifically. Thus, it should come as no surprise that Congress similarly would not make proof of actual damages an essential element of a claim for an "intentional or willful" Privacy Act violation.

c. The government does not dispute that an entitlement to "recovery" is far broader than an entitlement to "actual damages." Pet. Br. 15-16. Instead, the government contends (Resp. Br. 26-27) that a "person entitled to recovery" cannot be one receiving an "automatic" $1,000 statutory damages award in the absence of proof of "actual damages" because this would be a "free-standing award of money," and thus not a "recovery" of anything that had been lost. This argument is wrong in its own terms. It depends entirely on the government's assertion that Petitioner seeks to make the Act's $1,000 statutory damages "automatic" and unconnected to any "actual harm." As shown above, this assertion is false. The statutory damages award compensates for a real harm suffered

— *i.e.*, the "adverse effect," which, as in privacy violations of all types, is typically emotional distress. See Pet. Br. 17-18, 27. It is thus a "recovery" as the government defines the term.

The government's argument is also premised on an incorrect definition of "recovery." The government does not refute the common legal definitions of "recovery" set forth in Petitioner's brief. Pet. Br. 15-16 & n.4. Those definitions are not limited to "getting back" something taken away. Rep. Br. 26. They include: the "obtaining of a thing by the judgment of a court" (*Black's Law Dictionary* 1276 (6th ed. 1990)); "the establishment of a right by the judgment of a court" (S. Gifis, *Dictionary of Legal Terms* 369 (2d ed. 1993)); "to get back *or gain* by judgement in a court of law" (*The Oxford English Dictionary* 1367 (2d ed. 1989) (emphasis added)). Thus even a "free-standing award of money" (Resp. Br. 27 & n.7) would be a "recovery" in the law.

d. The government's only affirmative textual argument focuses entirely on Section 552a(g)(4)(A), to the exclusion of all surrounding provisions of the Act. The government contends that because the phrase "person entitled to recovery" appears for the "first and only time" in Section 552a(g)(4)(A) in the company of a reference to actual damages, it must "describe that particular class of individuals who have established some level of actual damages." Resp. Br. 28-29. Even putting aside the fact that this acontextual argument violates the "central tenet" that "a statute is to be considered in all its parts when construing any one of them" (*Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35-36 (1998)), the government has it exactly backward. Why would Congress have introduced the broader phrase "person entitled to recovery," and demarcated it from the first clause of Section 552a(g)(4)(A) with the adversative language "but in no case," if all it meant to do was refer to individuals who have quantified actual damages? If that were Congress' intent, it would have been far simpler to say "and no individual who has

proven actual damages shall receive less than the sum of $1,000."

The government asserts that Petitioner's interpretation of "person entitled to recovery" is "circular" because "it is precisely and only his purported eligibility for a $1000 award that makes him a 'person entitled to recovery.'" Resp. Br. 27. This is wrong. A Privacy Act plaintiff becomes a "person entitled to recovery" upon proving that a federal agency has committed a liability-imposing wrong — *i.e.*, has caused plaintiff an "adverse effect" as a result of an "intentional or willful" violation of the Act. As Petitioner pointed out in his opening brief, "questions concerning the proper measure of damages are 'no longer confused with a right of recovery' where 'a wrong has been done.'" Pet. Br. 15-16 (quoting *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 565-66 (1931)). Congress could have provided any number of recoveries for that wrong. The ones it selected were actual damages (for those plaintiffs who could quantify them), statutory damages of $1,000 (for those who could not), costs, and reasonable attorneys fees. Hence, the definition of "person entitled to recovery" is not dependent "only" on "eligibility for a $1000 award." Resp. Br. 27.

e. The government offers one affirmative contextual argument in support of its interpretation. It contends that because Sections 552a(g)(2) and (g)(3), which concern record correction and record access, do not provide for statutory damages, Section 552a(g)(4) should not be read to do so in the interest of "structural equity." Resp. Br. 35. To the extent that "structural equity" is a meaningful concept, there is ample reason why Section 552a(g)(2) and (g)(3) actions do not need a statutory damages remedy to make them effective, but Section 552a(g)(4) actions do.

First, Section 552a(g)(2) and (g)(3) actions do not require the plaintiff to demonstrate an "adverse effect." Thus, neither action is concerned with remedying harm. In contrast, a

Section 552a(g)(4) action requires the plaintiff to demonstrate, as an essential claim element, harm in the form of an "adverse effect." Because inherently difficult-to-quantify harms are the predominant ones where privacy violations are concerned (*see* Pet. Br. 16-18, 27-29), the availability of liquidated damages ensures a meaningful remedy in Section 552a(g)(4) actions. This remedy in turn provides incentive for citizen suits to enforce the Act, which deters future agency violations.

Second, a Section 552a(g)(4) action involves an "intentional or willful" violation of the Act. Section 552a(g)(2) and (g)(3) actions do not. Providing individuals with a particular incentive to bring suits for (and deter) "intentional or willful" agency violations of federal law makes good sense.

f. The government's effort (Resp. Br. 36) to explain the existence of Section 552a(g)(4)(A)'s $1,000 damages clause on the ground that it "simply eases or avoids quantification and other proof problems at trial" is directly at odds with the government's core assertion in this case, and proves Petitioner's point.

Quantification is the very essence of proving "actual damages." Thus, the court below accepted the government's argument that Petitioner's harm did not sound in "actual damages" precisely because he was unable to quantify his emotional distress in terms of costs like "medical and psychological treatment," "prescription medication," and "loss of income." Pet. App. 15a-16a. A Privacy Act plaintiff unable to quantify his harm in terms of "actual damages," therefore, is entitled to no recovery at all under the government's interpretation of the Act.

The government's concession that Section 552a(g)(4)(A)'s $1,000 damages clause is intended to "ease" or "avoid" proof problems proves Petitioner's point that it is, in fact, a liquidated damages clause. It is precisely where "a harm . . . would be difficult to quantify" that a "provision for liquidated

damages [is] highly appropriate." *Lawyer's Title Ins. Corp. v. Dearborn Title Co.*, 118 F.3d 1157, 1161 (7th Cir. 1997) (Posner, C.J.). *Accord Rex Trailer Co. v. United States*, 350 U.S. 148, 153 (1956) ("liquidated damages serve a particularly useful function when damages are uncertain in nature or amount or are unmeasurable") (internal quotation marks omitted); C. McCormick, *Damages* 604 (1935) (doctrine of "liquidated damages" developed in cases where harm was "incapable or very difficult of accurate estimation"). Congress placed Section 552a(g)(4)(A)'s $1,000 liquidated damages clause in the Privacy Act in recognition that the real, and typical, harms suffered as a result of a privacy violation are usually difficult to quantify, but nonetheless merit at least a limited recovery.

g. In summary, to make sense of the government's textual argument, the Court must read Section 552a(g)(4) as follows (words that must be ignored are crossed out; words that must be added are underlined):

> (4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States ~~shall~~ may be liable to the individual ~~in an amount equal to the sum of~~, but only if the individual also proves —
>
> (A) actual damages sustained as a result of the refusal or failure, ~~but~~ and ~~in no case shall a person entitled to recovery~~ an individual who has proven actual damages shall not receive less than the sum of $1,000; and
>
> (B) if the individual proves actual damages, the costs of the action together with reasonable attorney fees as determined by the court.

Any reading of the Privacy Act that requires this many implied insertions and deletions of language is not one that this Court should accept as plausible, much less compelling.[4]

4. **The government's citation to other statutes creating liquidated damages remedies only demonstrates that Congress has employed a number of verbal constructs to achieve the same result.** The government cites (Resp. Br. 30-32) seventeen federal statutes — each of which uses verbiage and structure that vary from the others to greater and lesser degrees, even within the supposed "categories" that the government purports to create — and admits that each of them clearly sets forth a statutory damages remedy that does not depend on quantification of actual damages. If these various statutes demonstrate anything, it is that Congress has employed several different constructs that achieve precisely the same result. This does not even suggest, much less compel, a holding that the Privacy Act's language should not be given its normal meaning. *See Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health and Human Res.*, 532 U.S. 598, 614-15 (2001) (Scalia J., concurring) ("[I]t would be no more rational to reject the normal reading of 'prevailing party' because some statutes produce the same result with different language than it would be to conclude that, since there are many synonyms for the word 'jump,' the word 'jump' must mean something else."). The language of Section 552a(g)(4) is plain, and it creates a statutory damages remedy that does not depend upon proof of actual damages.

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[4] In its opposition to certiorari (Opp. 9), the government suggested that there could be a class of "prevailing" individuals under the Privacy Act entitled to no damages recovery at all. See Pet. Rep. 5. That interpretation raised a potential Article III problem — namely, that there could be Privacy Act plaintiffs who could bring suit for attorneys' fees only. Pet. Br. 19. The government has now abandoned that argument in favor of its position that proof of actual damages is an essential element of a Privacy Act claim. Resp. Br. 39. While that position avoids an Article III problem, it only highlights the disconnect between the government's interpretation of the Privacy Act and the Act's text and structure.

The government's attempts to explain away the statutes cited by the Petitioner are similarly ineffectual. Section 2707(c) of the Electronic Communications Privacy Act ("ECPA") uses language materially identical to Section 552a(g)(4) to create a statutory damages remedy that does not depend on proof of actual damages. *See* Pet. Br. 22-23. The government does not argue that there is any significant language difference between ECPA Section 2707(c) and Privacy Act Section 552a(g)(4)(A). Instead, in a footnote, the government says that Section 2707(c) does not apply to the United States. Resp. Br. 34 n.11. This is not a valid ground of distinction.

As originally enacted in 1986, ECPA Section 2707(a) subjected the United States to suit, and thus to the statutory damages remedy in Section 2707(c). The government does not dispute Petitioner's showing that Congress clearly stated its intent that Section 2707(c) allow a $1,000 statutory damages award without quantification of actual damages. *See* Pet. Br. 22. It was not until 2001 that, as part of the USA-Patriot Act, Congress amended the ECPA to exclude the United States from the civil-suit provision. *See* Pub. L. No. 107-56 § 223(b), 115 Stat. 272, 293-94. And, prior to the 2001 amendment, at least one federal court held the United States liable for $1,000 statutory damages under Section 2707(c), even though the plaintiff could not quantify any "compensatory damages." *See Steve Jackson Games, Inc. v. United States Secret Serv.*, 816 F. Supp. 432, 443 (W.D. Tex. 1993), *aff'd*, 36 F.3d 457 (5th Cir. 1994).

The government derides Petitioner's example of Section 7217(c) of the Tax Reform Act because it was repealed and because it authorized suits against federal officials in their personal capacity. Resp. Br. 33. But the government does not (and cannot) dispute that Congress expressly stated its intent to create a statutory damages remedy that did not depend on quantifying actual damages: "[B]ecause of the difficulty in

establishing in monetary terms the damages sustained by a taxpayer as the result of the invasion of his privacy caused by an unlawful disclosure of his returns or return information, the amendment provides that these damages would, in no event, be less than liquidated damages of $1,000 for each disclosure." S. Rep. No. 94-938, at 348 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2897, 3778; *see* Pet. Br. 21. It is simply immaterial that this provision was repealed and that it spoke to liability of federal officials in their personal capacity. Congress employed materially identical language to that found in Section 552a(g)(4)(A) expressly to create a privacy-protective statutory damages remedy that did not depend on a showing of actual damages.

Indeed, if there could be any doubt that Section 7217(c)'s application to federal officials in their personal capacity does not affect the interpretation, one need only look to Section 6110(j)(2)(A) of the same statute, which makes the United States liable for "intentional[] or willful[]" tax-document privacy violations. In language identical in structure and materially identical in wording to that found in Section 7217(c) and the Privacy Act, Section 6110(j)(2)(A) creates a $1,000 statutory damages remedy that Congress expressly stated was independent of proof of actual damages. Pet. Br. 21-22. As with Section 7217(c), the government does not (and cannot) dispute Congress's intent with regard to this provision.

5. **Relevant legislative history confirms that Section 552a(g)(4)(A) contains a $1,000 liquidated damages provision**. The Privacy Act's $1,000 statutory damages provision emerged as a compromise between the Senate and the House. The Senate's express desire, shared by a number of House members, that the Act include a "liquidated damages" provision to be "assessed against the agency for a violation of the Act" was accommodated by Section 552a(g)(4)'s inclusion of the $1,000 damages clause along with the "actual damages" clause. Indeed, the government

concedes (Resp. Br. 42 n.15) that Section 552a(g)(4)(A)'s statutory damages clause was added "the next day" after the Senate Committee on Government Operations called for a liquidated damages provision. The House's countervailing concern that the government's liability be constrained by a strict culpability requirement was accommodated by making the United States' liability turn on a showing of "intentional or willful" conduct. *See* Pet. Br. 29-31.

The government contends, however, that because a few earlier bills dealing with privacy issues — none of which were the basis of the Privacy Act — mentioned "liquidated damages" and were not enacted, Section 552a(g)(4)(A) must not contain a liquidated damages provision. Resp. Br. 40-41, 44 n.18. There is no basis to draw such an inference. These bills differed in numerous and substantial ways from the bills that ultimately became the Privacy Act, and the bases for their rejection are unknown. Indeed, if these bills demonstrate anything, it is that Congress was well aware that a liquidated damages provision of some sort was necessary to make a privacy-protection statute effective. *See also* Br. of *Amici Curiae* Electronic Privacy Information Center, *et al.*, at 13-18.

The government also contends (Resp. Br. 43) that Congress delegated consideration of a liquidated damages remedy to the Privacy Protection Study Commission ("PPSC"). This is wrong. Congress charged the PPSC to determine whether the Privacy Act should be amended to include a "general damages" remedy. As the government acknowledges (Resp. Br. 42 n.15), just before final passage of the Act, the Senate bill provided for "actual and general damages sustained by any person, but in no case shall a person entitled to recovery receive less than the sum of $1,000." Only the "general damages" language was dropped in the final Act. The liquidated damages language expressly called for by the Senate was retained. Thus, Congress's submission of the "general damages" question to the PPSC may bear on the question

whether non-pecuniary emotional distress is encompassed within the term "actual damages" as used in the Privacy Act — a question that is also the subject of a split of authority among the federal courts of appeals, but that the parties agree is not directly presented in this case. That delegation, however, has no bearing on the interpretation of Section 552a(g)(4)(A)'s $1,000 statutory damages provision.[5]

6. **Petitioner's interpretation of the Privacy Act properly reflects Congress's balancing of the needs to protect privacy rights and to avoid excessive government liability.** The Privacy Act, as properly interpreted, reflects a careful balance by (i) providing a recovery for the dignitary harm and associated emotional distress of a privacy invasion (often the only harm associated with such a claim), which ensures that the Act encourages citizen suits to vindicate privacy rights and concomitantly deters agencies from violating the Act; and (ii) placing important checks on the United States' liability in the form of a strict "intentional or willful" culpability requirement and a $1,000 cap on the liquidated damages available when quantification of actual damages is impossible. Pet. Br. 27, 29-31.

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[5] The government's attempt to disavow relevant administrative guidance is also ineffective. The government asserts (Resp. Br. 47-48) that an unidentified official has stated that "OMB does not interpret its Guideline to require the payment of $1000 to plaintiffs" who cannot quantify "actual damages." This OMB "statement" is entitled to no consideration by this Court. There is no indication that the person who made it is in any position to issue authoritative statements of OMB policy. Moreover, this position is at best newly minted for litigation. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988). Finally, it is noteworthy that the OMB's longstanding interpretation of Section 552a(g)(4)(A) — "the United States will be required to pay . . . actual damages or $1,000, whichever is greater" (40 Fed. Reg. 28,948, 28,970 (1975)) — is materially identical to language the government itself offers as creating a clear entitlement to statutory damages that are not dependent on proof of actual damages — "actual damages *or* statutory damages of $1000, whichever is greater" (Resp. Br. 14).

The government's insistence that Petitioner's argument proceeds from a "single-minded focus on encouraging Privacy Act litigation, to the exclusion of the fiscal consequences attending the authorization of broad damages awards" (Resp. Br. 45), flatly misrepresents Petitioner's position. To the extent that the government's argument is an attempt to raise the specter of runaway liability (*see* Resp. Br. 22-23 & n.5), two responses are appropriate.

First, from the Privacy Act's effective date of January 1, 1975, to (at the earliest) 1997, when the Sixth Circuit decided *Hudson v. Reno*, 130 F.3d 1193 (6th Cir. 1997), *overruled in part*, *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001), the federal courts of appeals unanimously had held that Section 552a(g)(4)(A) authorizes a $1,000 statutory damages remedy that does not depend upon proof of actual damages. Yet, in those 22 years, the type of massive liability the government imagines never occurred. Surely, if the government's parade of horribles were going to happen, it would have happened before now.

Second, the government's fears about a $1,000 statutory damages award being available for every single wrongful disclosure and about class-action litigation are overstated. The D.C. Circuit held in *Tomasello v. Rubin*, 167 F.3d 612 (D.C. Cir. 1999), that the $1,000 statutory damages remedy is available for each act by an agency that violates the Act. But, the court held, aggregation of "several more-or-less contemporaneous transmissions of the same record into one 'act'" is appropriate. *Id.* at 618 (ATF agent's fax to 4500 other agents was a single act meriting only one $1,000 recovery). Class-action litigation under the Act has proven unsuccessful largely because of the need for each plaintiff to demonstrate an "adverse effect" caused by a violation of the Act. Indeed, in one case cited by the government — *Schmidt v. Department of Veterans Affairs*, No. 00-C-1093, 2003 WL 22346323 (E.D. Wis. Sept. 30, 2003) — the district court held that Section

552a(g)(4)(A) permits a $1,000 statutory damages award that does not depend on proof of actual damages. *Id.* at *16. The court nonetheless refused to certify a class on the ground that each individual would have to prove he "suffered an adverse effect as a result of the VA's failure to comply with [the Act]." *Id.* at *18; *see also Lyon v. United States*, 94 F.R.D. 69, 76 (W.D. Okla. 1982) ("In Privacy Act damages actions, questions affecting only individual members greatly outweigh questions of law and fact common to the class.").

CONCLUSION

For these reasons, and for the reasons stated in Petitioner's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

BUCK DOE,

Petitioner,

v.

ELAINE L. CHAO, SECRETARY OF LABOR,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRUIT

BRIEF OF AMICI CURIAE ELECTRONIC PRIVACY INFORMATION CENTER, AMERICAN CIVIL LIBERTIES UNION, AMERICAN LIBRARY ASSOCIATION, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, CENTER FOR DEMOCRACY AND TECHNOLOGY, CONSUMER PROJECT ON TECHNOLOGY, ELECTRONIC FRONTIER FOUNDATION, NATIONAL CONSUMERS LEAGUE, PRIVACY RIGHTS CLEARINGHOUSE, PRIVACYACTIVISM, U.S. PUBLIC INTEREST RESEARCH GROUP, AND 16 LEGAL SCHOLARS AND TECHNICAL EXPERTS IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE [1]

All *amici curiae* represented in this brief have a significant interest in the effective enforcement of privacy laws in the United States. The groups also share a common concern regarding the increase in identity theft, a crime that is facilitated by the misuse of the Social Security Number.

Amici Privacy, Consumer, and Civil Liberties Organizations

The Electronic Privacy Information Center ("EPIC") is a public interest research center in Washington, D.C. that was established in 19994 to focus public attention on emerging civil liberties issues. EPIC has participated as *amicus curiae* in numerous privacy cases, including *Smith v. Doe*, 123 S. Ct. 1140 (2003), *Dep't. of Justice v. City of Chicago*, 123 S. Ct. 1352 (2003), *Watchtower Bible and Tract Soc'y of N.Y. Inc. v. Vill. of Stratton*, 536 U.S. 150 (2002), and *Reno v. Condon*. 528 U.S. 141 (2000).

The American Civil Liberties Union ("ACLU") is the largest civil liberties organization in the United States, with approximately 400,000 members. Over its 83-year history, the ACLU has consistently defended the principles of liberty enshrined in the Bill of Rights, including the right to privacy.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. In accordance with Rule 37.6 it is stated that no monetary contributions were made for the preparation or submission of this brief, and this brief was not authored, in whole or in part, by counsel for a party. Law school students participating in the EPIC Internet Public Interest Opportunities Program (IPIOP) Erik J. Blum, Eva Gutierrez, Sherwin Siy, Tiffany A. Stedman, and Maryam Zafar assisted in the preparation of the brief.

The American Library Association ("ALA"), founded in 1876, is the oldest and largest library association in the world. With a membership of more than 64,000 librarians, library trustees, library educators, friends of libraries and other interested persons from every state, ALA is the chief advocate for the people of the United States in their search for the highest quality of library and information services.

The Asian American Legal Defense and Education Fund ("AALDEF"), founded in 1974, promotes and protects the civil rights and civil liberties of Asian Americans through litigation, advocacy and community education. AALDEF is particularly concerned about the privacy rights of immigrants and new citizens.

The Center for Democracy and Technology is a non-profit public interest organization in Washington, D.C. dedicated to promoting civil liberties in this age of digital technologies, including advocating strong privacy protections for personal information in government databases.

The Consumer Project on Technology is a non-profit organization created by Ralph Nader to investigate consumer concerns relating to new technologies.

The Electronic Frontier Foundation is a non-profit, civil liberties organization based in San Francisco, California that works to protect privacy and free speech rights in the digital world.

The National Consumers League, the nation's oldest consumer organization, is a private, nonprofit advocacy group representing consumers on marketplace and workplace issues.

Privacyactivism is a non-profit organization whose goal is to enable people to make well-informed decisions

about the importance of privacy on both a personal and societal level

The Privacy Rights Clearinghouse is a nonprofit consumer education, research, and advocacy organization, established in 1992 and based in San Diego, California.

The U.S. PIRG serves as the national association of state Public Interest Research Groups. PIRGs are non-profit, non-partisan public interest advocacy groups. The PIRGs have a longstanding interest in privacy protection, and have recently published several major reports on the problems of identity theft, which is exacerbated by easy access to Social Security Numbers.

Amici Legal Scholars and Technical Experts

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SUMMARY OF THE ARGUMENT

At issue in this case is whether a plaintiff suing under the Privacy Act of 1974, 5 U.S.C. § 552a, for the wrongful disclosure of the Social Security Number must show actual damages in order to recover the statutory damages of $1,000.

Social Security Number disclosures may result in serious harms. This is because the Social Security Number is used as an identification code for databases containing a wide range of financial, medical, educational, and credit information. It is like a master key that opens many doors. Public safety and personal privacy require that the distribution of the SSN be carefully controlled.

The civil remedy provision in the Privacy Act, like many similar provisions in other privacy statutes, provides for the recovery of either actual damages or statutory damages where intentional violations of the Act occur. Congress has long incorporated liquidated damages provisions in privacy statutes to ensure enforcement of such statutes, promote judicial economy, and provide a specified remedy where it would otherwise be difficult or impracticable to determine monetary damages. The need to provide such a remedy is particularly important in privacy cases, where scholars and the courts have long recognized the difficulty in quantifying harm.

The legislative history of the Privacy Act, as well as a significant government report that provided the basis for the Act, make clear Congress's intent to limit the use of the Social Security Number and to provide meaningful remedies for misuse. Congress explicitly recognized the particular risk to privacy that could result from such disclosures and thus provided a damages provision that would enable the public to

enforce the legal protections against wrongful Social Security Number disclosure.

With the growing threat of identity theft and the significant risk of misuse of the Social Security Number, it is particularly important for the Court to ensure effective enforcement of the Act and to interpret the liquidated damages provision as Congress intended. The crabbed reading of the key statutory language by the court below – one that has been rejected by virtually all the other circuits – should be rejected.

ARGUMENT

Consideration of the petitioner's claim – that intentional or willful disclosure by the government of the Social Security Number ("SSN") automatically entitles the plaintiff to the $1,000 statutory damages – requires an appreciation of the significant harms that can occur with the disclosure of the SSN, the history of liquidated damages in general, and the intent of Congress in enacting these provisions, as evidenced by the legislative history.

I. The Wrongful Disclosure of the Social Security Number Creates an Ongoing Privacy Risk

Central to the protection of privacy in our modern society are the provisions in the Privacy Act of 1974 that seek to limit both the tangible and intangible harms that flow from the wrongful disclosure of the Social Security Number. As Judge Michael wrote in partial dissent in the decision below, an individual can be adversely affected before any crime occurs due to distress about possible misuse of his illegally disclosed SSN. 306 F.3d 170, 185 (4th Cir. 2002) (Michael, J., dissenting). As the Fourth Circuit earlier stated

in *Greidinger v. Davis*, "the harm that can be inflicted from the disclosure of an SSN to an unscrupulous individual is alarming and potentially financially ruinous." 988 F.2d 1344, 1354 (4th Cir. 1993). Numerous studies demonstrate the risk of harm that results from the wrongful disclosure of the SSN, as well as the practical problems that may arise in trying to quantify privacy harms. The statutory damage provision in the Privacy Act recognizes these risks and specifically seeks to prevent the misuse of the Social Security Number, even in the absence of proof of actual damages.

A. The Historical Use of the SSN

The SSN was established in 1936 as a nine-digit account number to "to facilitate the early manual bookkeeping operations associated with the creation of Social Security in the 1930s." Social Security Administration, *Frequently Asked Questions*, *Q18*, *available at* http://www.ssa.gov/history/hfaq.html. Because of the importance placed on privacy in the Social Security program, the very first regulation adopted by the new Social Security Board in June 1937 was its rules regarding confidentiality of its records. Social Security Administration, *Regulation No. 1* (adopted July 17, 1936), *available at* http://www.ssa.gov/history/reg1.html. A special effort was made to limit the use of the Social Security Number for purposes unrelated to the administration of the program. The Social Second card, as published by the federal government in 1946, bore the words "For Social Security Purposes - Not for Identification." Social Security Administration, *Frequently Asked Questions*, *Q21*, *available at* http://www.ssa.gov/history/hfaq.html.

Over time, however, SSNs were used for purposes unrelated to the administration of the Social Security system. For example, in 1961 Congress authorized the Internal

Revenue Service to use SSNs as taxpayer identification numbers. Dep't. of Health, Educ. and Welfare, Secretary's Advisory Comm. on Automated Personal Data Systems, *Records, Computers, and the Rights of Citizens* 114 (Government Printing Office 1973) [hereinafter "HEW Report"]. Public concerns about the automation of personal information in government agencies began to grow. In response to the recommendations contained in the HEW Report and the growing risks associated with the accumulation of massive amounts of personal information, Congress passed the Privacy Act of 1974. Pub. L. 93-579, codified at 5 U.S.C. § 552a. Among other things, the Privacy Act makes it unlawful for a governmental agency to deny a right, benefit, or privilege merely because the individual refuses to disclose his SSN. Pub. L. 93-579, § 7.

When the Privacy Act was enacted, Congress recognized the dangers of widespread use of SSNs as universal identifiers. Section 7 of the Privacy Act provides that any agency requesting an individual to disclose his SSN must "inform that individual whether that disclosure is mandatory or voluntary, by what statutory authority such number is solicited, and what uses will be made of it." Pub. L. 93-579, § 7(b). In support of this provision, the Senate Committee on Government Operations stated that the widespread use of SSNs as universal identifiers was "one of the most serious manifestations of privacy concerns." S. Rep. No. 93-1183 at 28, *reprinted in* Staffs of Senate Comm. on Government Operations and the House Comm. on Government Operations, 94th Cong., *Legislative History of the Privacy Act of 1974 – S. 3418 (Public Law 93-579)* 181 (Joint Comm. Print 1976) [hereinafter "Legislative History"].

B. Harms from SSN Disclosure in Recent Years

The use of the SSN has expanded significantly since the Privacy Act was enacted in 1974. A recent General Accounting Office ("GAO") study found that government and some private entities rely extensively on SSNs, increasing the availability of these numbers to the public. *Privacy Report*, Vol. 2, No. 28 (July 14, 2003). This study also identified numerous examples of public and private databases that were compromised and SSNs that were stolen. *Id.* In some cases, the display of SSNs in public records and unprotected Web sites fostered identity theft. *Id.*

The GAO has also recognized the risk of identity theft via SSN disclosure. General Accounting Office, *Social Security Numbers: Government Benefits from SSN Use but Could Provide Better Safeguards*, GAO-02-352 (2002). This report notes that along with names and birth certificates, SSNs are among the three most sought-after identifiers by identity thieves. *Id.* at 13 (*citing* United States Sentencing Commission, *Identity Theft Final Alert* (1999)). The GAO also noted that identity theft is on the rise, with the Social Security Administration receiving 11,000 complaints of SSN misuse in fiscal year 1998, but more than 65,200 such complaints in fiscal year 2001. *Id.* at 14.

The increasing number of complaints is accompanied by rising costs to individuals. Consumers reported losses from fraud totaling more than $343 million in 2002. Testimony of Barbara Bovbjerg, Director of Education, Workforce, and Income Security Issues, General Accounting Office, *Social Security Numbers: Ensuring the Integrity of the SSN, Hearing before the House Social Security Subcommittee of the Ways and Means Committee* (2003) at 3. Identity theft accounts for over 80 percent of SSN misuse. *Id.*

However, many of the problems resulting from the misuse of the SSN cannot easily be quantified as actual damages. Data collected by the Federal Trade Commission ("FTC") and compiled by the GAO highlight the non-monetary losses suffered by individuals whose identities have been stolen. General Accounting Office, *Identity Theft: Prevalence and Cost Appear to be Growing*, GAO-02-363 at 55 (2002). Non-monetary losses were common. Of a sampling of 77,316 identity theft victims, 13,357 reported non-monetary harms as defined by the FTC. *Id.* at 56. Included as non-monetary costs were harms such as victims being denied credit or other financial services (7,376 victims); lost time due to resolving problems (3,489); being unjustly harassed by debt collectors or creditors (2,968); being subjected to criminal investigation, arrest, or conviction (1,281); having a civil suit filed or judgment entered against them (819); and being denied employment or losing their jobs (580 victims). *Id.*

The FTC reported, based on victim-initiated complaints to the agency, a large increase in the number of identity theft cases in the last year and a doubling of the dollar loss attributable to fraudulent activities directed at U.S. consumers. *Fraud Charges Jump in 2002 on Consumer Complaints, ID Thefts*, Electronic Com. & L. Rep., Vol. 8(4), Jan. 29, 2003. The agency noted that the number of fraud complaints rose from 220,000 in 2001 to 380,000 in 2002 and the loss to consumers grew from $160 million in 2001 to $343 million in 2002. *Id.* The report revealed that identity theft topped the list of consumer complaints filed with the FTC, accounting for forty-three percent of the complaints lodged in the Consumer Sentinel database. *Id.* Furthermore, the most recent identity theft data from the Federal Trade Commission shows that seventy-two percent of victims do

not know how the thief obtained their personal information. *Information on Identity Theft for Consumers and Victims from January 2002 Through December 2002*, Fed. Trade Commission Rep. at 8, *available at* http://www.consumer.gov/idtheft/reports/CY2002ReportFinal.pdf.

The link between crime, and possibly even terrorist acts, and the availability of the SSN is so strong that the Social Security Administration ("SSA") recently warned: "The SSN is a valuable commodity for criminals at all levels, as it allows individuals to integrate themselves into our society with relative anonymity and commit crimes or acts of terrorism, while avoiding detection." Social Security Administration Office of the Inspector General, *Social Security Number Misuse*, June 2003, *available at* http://www.ssa.gov/oig/executive_operations/factsheet1.htm. The SSA further reported that fifty-eight percent of its fiscal year 2002 complaints involved SSN misuse. *Id.* Given the growing urgency of the problem, the agency recommended that Congress "[p]rohibit the sale of SSNs, prohibit their display on public records, and limit their use to valid transactions." *Id.*

Similar concerns about the growing misuse of the SSN have been expressed at the state level. In January 2002, a special Florida grand jury commissioned to investigate identity theft recommended stronger legal protections for personal data, including SSNs, held by business and state agencies. *Identity Theft in Florida*, Sixteenth Statewide Grand Jury Report, SC 01-1095, Supreme Court of Florida (Jan. 10, 2002) *at* http://www.idtheftcenter.org/attach/FL_idtheft_gj.pdf. The grand jury called for laws that would stop State agencies from disseminating personal information under the open records law without individual consent, court order, or the articulation of a compelling need. *Id.* The grand

jury estimated that the current $2.5 billion nationwide cost of identity theft is expected to grow to $8 billion by 2005. *Id.* It found that the financial services industry loses $17,000 per compromised identity. It cited health clubs and video rental stores requiring SSNs on applications and local governments asking for SSNs on routine transactions as a cause of identity theft. *Id.*

Because of the risk of identity theft associated with revealing the SSN, the Wall Street Journal recently advised readers not disclose their SSN: "Don't give out your Social Security number unless you have to: With identity theft a growing problem, you should be extremely cautious about giving out that information." *A To-Don't List For the New Year, How to Fix Your Life in 2003*, Wall St. J., Dec. 31, 2002. *See also* Federal Trade Commission, *ID Theft: When Bad Things Happen to Your Good Name* 3 (2002) ("Give your SSN only when absolutely necessary . . . Don't carry your SSN; leave it in a secure place . . .), *available at* ttp://www.ftc.gov/bcp/conline/pubs/credit/idtheft.htm.

A report from two leading consumer organizations also makes clear the risk that the misuse of the Social Security Number can contribute to identity theft. "Many victims complained that easy access to their Social Security numbers made it easy for identity thieves to impersonate them." CALPIRG & Privacy Rights Clearinghouse, *Nowhere to Turn: Victims Speak Out on Identity Theft* 17 (2000). The consumer organizations also found that the harms were often not easy to quantify:

> Although the fraud committed against the victims surveyed totaled as much as $200,000, the common themes were that stress, emotional trauma, time lost, and damaged credit reputation – not the financial aspect of the fraud – were the most difficult problems. One victim from Nevada explained, "(T)his is an extremely excruciating and violating experience, and clearly the most difficult obstacle I have ever dealt with."

Id. at 4.

The growing risk of identity theft, based in part on the misuse of the Social Security Number, is precisely the type of adverse effect that the Privacy Act seeks to limit. A requirement for showing actual damages in this context would effectively frustrate the purposes of the Act.

II. Liquidated Damage Provisions Are a Long-Standing Technique to Provide Remedies for Privacy Violations

Tort law has long provided remedies for intangible harms, such as those resulting from defamatory statements or torts against dignity. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1283 (1976). Violation of privacy is such an intangible harm that has become increasingly significant in tort law. A central problem in privacy cases is the difficulty for the injured party to demonstrate actual damages. Frederick Lodge, *Damages Under the Privacy Act of 1974: Compensation and Deterrence*, 52 Fordham L. Rev. 611, 612 (1984). This problem was well understood by Samuel Warren and Louis Brandeis, the authors of the famous article that provided the basis for the privacy tort. *The Right to Privacy*, 4 Harv. L. Rev. 193, 219 (1890) ("Even in the absence of special damages, substantial compensation could be allowed for injury to feelings as in the action of slander and libel.")

Thus, in order to compensate the victim and recognize that a harm was committed, though it may be difficult to quantify, privacy statutes routinely include liquidate damage provisions. While the actual language providing statutory damages varies, there is no significant difference in the purpose. As Justice Scalia wrote in concurrence in *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Servs.*:

> [I]t would be no more rational to reject the normal meaning of 'prevailing party' because some statutes produce the same result with different language, than it would be to conclude that, since there are many synonyms for the word 'jump,' the word 'jump' must mean something else.

532 U.S. 589, 614-15 (2001) (Scalia, J., concurring). Where there is an intentional violation of a privacy statute, awards of such damages ensure compensation for the victim, deter future violations, and promote judicial economy by reducing the need for difficult determination of harm in cases.

A. Privacy Scholars Recognize the Critical Role of Liquidated Damage Provisions in Privacy Statutes.

Scholars have argued that the purpose of liquidated damages in privacy statutes is not only to compensate the victim for an intangible harm, but also to provide enforcement of such statutes. *See, e.g.*, Mark E. Budnitz, *Privacy Protection For Consumer Transactions in Electronic Commerce: Why Self-Regulation is Inadequate*, 49 S.C. L. Rev. 847, 883 (1998). Professor Jay Weiser has written that federal privacy statutes attempt to resolve the difficulty in calculating damages through liquidated damages provisions,

which in turn saves enforcement costs. Jay Weiser, *Measure of Damages for Violation of Property Rules: Breach of Confidentiality*, 9 U. Chi. L. Sch. Roundtable 75, 100 (2002). Liquidated damage provisions also relieve juries of difficult damages determinations. Jonathan L. Entin, *The Right to Privacy One Hundred Years Later: Privacy Rights and Remedies*, 41 Case W. Res. L. Rev. 689, 693 (1991). Thus, highly discretionary calculations are unnecessary. The purpose of statutory damages is both to encourage a victim to pursue a case under a privacy statute and to serve as a deterrent to would-be violators. Frank P. Anderano, *The Evolution of Federal Computer Crime Policy*, 27 Am. J. Crim. L. 81, 98 (1999).

Professor Daniel J. Solove points to another reason to ensure that restrictions on the misuse the SSN are effectively enforced: victims often do not know when a breach has occurred:

> Victims are often unaware that their identities have been stolen until long after the identity theft has begun. A report based on victim surveys estimates that it takes victims over a year to discover they have been victimized. According to FTC estimates, 20% of identity theft victims learn of the theft after two years.

Daniel J. Solove, *Identity Theft, Privacy, and the Architecture of Vulnerability*, 54 Hastings L.J. 1227, 1248 (2003). Solove further suggests that the costs of identity theft are also borne by other than those who are the targets. "[B]eyond losses to particular individuals, identity theft results in losses to creditors, financial institutions, and companies, and these losses are passed down to consumers in the form of higher interest rates, prices, and fees." *Id.* at 1246.

Scholars also consider the inclusion of liquidated damage provisions important for effective privacy laws in such new areas as the Internet. For example, Professor Jerry Kang has set out a model "Cyberspace Privacy Act" which provides that: "The court may award actual damages but not less than liquidated damages computed at the rate of $100 for each separate violation or $5000, whichever is higher." Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 Stanford L. Rev. 1193, 1293 (1998).

B. Liquidated Damage Provisions are Routinely Included in Statutory Privacy Laws

Numerous privacy statutes contain liquidated damages provisions to both compensate the victim and deter future violations. For example, the Video Privacy Protection Act ("VPPA") and the Drivers Privacy Protection Act ("DPPA") provide for a statutory damage award where intentional violations of the acts occur. 18 U.S.C. § 2710; 18 U.S.C. § 2721. The VPPA provides that "the court may award actual damages but not less than liquidated damages in an amount of $2,500." 18 U.S.C. § 2710(c)(2)(A). In essentially the same language, the DPPA provides that "the court may award (1) actual damages, but not less than liquidated damages in the amount of $2,500" against "[a] person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter[.]" 18 U.S.C. § 2724(b)(1), (a).

Similarly, the Electronic Communications Privacy Act of 1986 ("ECPA") establishes statutory damage awards, depending on the type of violation. For example, in relation to the interception of electronic communications, ECPA provides that "if the person who engaged in that conduct has not previously been enjoined under section 2511(5) and has

not been found liable in a prior civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $50 and no more than $500." 18 U.S.C. § 2520(c)(1)(A). The court is required to award statutory damages of no less than $100 and no more than $1,000 for victims of those who have violated ECPA on a previous occasion. 18 U.S.C. § 2520(c)(1)(B). For more than two violations of ECPA, the statute provides that:

> [I]n any other action under this section, the court may assess as damages whichever is the greater of (A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or (B) statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000.

18 U.S.C. § 2520(c)(2)(B). Furthermore, regarding unlawful access to stored communications, ECPA provides that the court may assess actual damages suffered by the plaintiff and profits made by the violator as a result of the violation, "but in no case shall a person entitled to recover receive less than the sum of $1,000." 18 U.S.C. § 2707(c).

There are many other privacy statutes that provide liquidated damages. The Cable Communications Policy Act ("CCPA"), which protects the privacy of cable television subscribers, provides that "the court may award actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher." 47 U.S.C. § 551(f)(2)(A). The Telephone Consumer Protection Act ("TCPA"), a privacy statute that protects individuals from constant telemarketing,

also provides statutory damages: "the court may award actual damages, but not less than liquidated damages in the amount of $2,500." 47 U.S.C. § 2724(b)(1). Additionally, under the Right to Financial Privacy Act of 1974 ("RFPA"), which was enacted the same year as the Privacy Act provision now before the Court, a successful plaintiff may collect $100 per RFPA violation from the defendant. 12 U.S.C. § 3417(a)(1).

As the drafters of the Privacy Act and privacy statutes enacted since understood, liquidated damage provisions are an essential requirement for meaningful privacy protection.

III. The Foundational 1973 Report, the 1974 Act, and the 1975 Agency Guidelines All Intended that the Privacy Act would Provide Liquidated Damages

The history of the Privacy Act indicates a clear intent to provide liquidated damages where a violation occurs. The federal advisory committee report that preceded the Act recommended liquidated damages; the OMB Guidelines that implemented the Act provided for liquidate damages. The final language in the Act incorporated the liquidated damages provision drafted in the Senate and agreed to by the House.

A. The HEW Advisory Committee Report of 1973

The Privacy Act of 1974 was enacted out of a growing concern for the rights of citizens in the face of advancing technology. The Act was the legislative culmination of extensive academic research that revealed the many threats to individual privacy and autonomy in the wake of increasingly powerful computer databases. One of the most influential studies to which the Congress looked when drafting the Privacy Act was the 1973 report *Records, Computers, and the Rights of Citizens*, prepared for the Department of Health, Education and Welfare ("HEW

Report"). The federal advisory committee that produced the report sought to determine the limitations that should be placed on the application of computer technology to record keeping about citizens. *Id.* at 33. The advisory committee foresaw that sensitive or personal information could be compromised when compiled into vast databases that lacked regulatory oversight. *Id.* at 28. Ultimately, the HEW Report outlined a series of recommendations that became the basis of the Privacy Act of 1974.

To address the lack of privacy protections in automated record keeping systems, the HEW Report recommended the enactment of legislation establishing a Code of Fair Information Practices that would govern all automated personal data systems. *Id.* at 50. The Code articulated basic informational privacy principles, and allocated rights and responsibilities in the collection and use of personal information. *Id.* The Code of Fair Information Practices proposed by the HEW Report provides:

- There must be no personal-data record-keeping systems whose very existence is secret.
- There must be a way for an individual to find out what information about him is in a record and how it is used.
- There must be a way for an individual to prevent information obtained about him for one purpose from being used or made available for other purposes without his consent.
- There must be a way for an individual to correct or amend a record of identifiable information about him.

> • Any organization creating, maintaining, using, or disseminating records of identifiable personal data must assure the reliability of the data for their intended use and must take reasonable precautions to prevent misuse of the data.

Id. at 41.

These highly influential principles formed the basis of the Privacy Act of 1974 and many privacy laws since. R. Turn and W.H. Ware, *Privacy and Security Issues in Information Systems*, in ETHICAL ISSUES IN THE USE OF COMPUTERS 133, 138 (Deborah G. Johnson & John W. Snapper eds. 1985). See also Robert Gellman, *Does Privacy Law Work? in* TECHNOLOGY AND PRIVACY: THE NEW LANDSCAPE 193, 196 (Philip E. Agre & Marc Rotenberg, eds.) ("The articulation of principles of fair information practices may be the computer age's most significant policy development with respect to privacy.").

Of particular concern to the advisory committee was the increasing ease with which personal information could be linked to an individual by means of Standard Universal Identifier ("SUI"). HEW Report at 112. Public opposition during the 1960s to the misuse of the Social Security Number was evident during a series of hearings held on privacy and information collection. *See, e.g., Federal Data Banks, Computers and the Bill of Rights: Hearings Before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee*, 92d Cong., 1st Sess. Part I, 775-881 (1971). As HEW Secretary Elliot Richardson testified in 1971:

> There would certainly be an enormous convenience in having a single identifier for each individual . . . [making] more efficient the acquisition, storage, and use of data . . . . It is the very ease of assembling complete records, of course, which raises the specter of invasion of privacy.

Id. at 784. *See also* ALAN F. WESTIN AND MICHAEL A. BAKER, DATABANKS IN A FREE SOCIETY 399 (1972) ("adopting the Social Security number officially as a national identifier or letting its use spread unchecked cannot help but contribute to public distrust of government").

Thus, in addition to outlining broad recommendations to safeguard personal information in automated personal data systems, the HEW advisory committee also recommended against the adoption of any standardized identifier, whether the SSN or otherwise, that would "enhance the likelihood of arbitrary or uncontrolled linkage of records about people, particularly between government and government-supported automated personal data systems." HEW Report at xxxiii. The advisory committee specifically recommended against the use of the SSN for generalized record keeping:

> Accordingly, we recommend . . . [t]hat any organization or person required by Federal law to obtain or record the SSN of any individual from making any use or disclosure of the SSN without the informed consent of the individual, except as may be necessary to the Federal government purposes for which it was required to be obtained and recorded. This prohibition should be established by a specific and preemptive act of Congress.

Id. at 130-31. The committee foresaw that the use of the SSN as a means of record keeping–for example, as case numbers

in compensation claims as in this case–was directly at odds with the protections due such a sensitive identifier. *Id.* at 30. The committee's recommendation was "intended to constrain the behavior of organizations and persons that are legally required to obtain and record the SSN for federal purposes, but which use the SSN in other ways that constitute virtual public dissemination." *Id.*

The HEW Report also recommended strong legal remedies for privacy violations. *Id.* at 36. "Unless injury to the individual can be translated into reasonably substantial claims for damages, the individual ordinarily has little incentive to undertake a lawsuit. Few people can afford to bring suit against a well-defended organization solely for moral satisfaction." *Id.* The advisory committee recommended "the enactment of legislation establishing a Code of Fair Information Practices for all automated personal data systems." *Id.* at 50. Regarding violations of the Act, the HEW Report said:

> The Code should give individuals the right to bring suits for unfair information practices to recover actual, *liquidated*, and punitive damages, in individual and class actions. It should also provide for recovery of reasonable attorney's fees and other costs of litigation incurred by individuals who bring successful suits.

Id. (emphasis added). The Privacy Act, enacted a year after the HEW Report was released, implemented many of the advisory committee's recommendations, including restrictions on the use of the Social Security Number and liquidated damages for violations of the Act.

B. Legislative History of the Privacy Act of 1974

The civil remedy provision in the Privacy Act was as a compromise between the Senate bill, which held the government liable regardless of culpability and provided for both actual and general damages, with liquidated damages of $1,000; and the House bill, which required that the violation be "willful, arbitrary, or capricious" before awarding only actual damages. The compromise retains the $1,000 in liquidated damages in lieu of general damages, but allows this recovery and actual damages only if the violation is "intentional or willful."

1. Statutory Damages

The original Senate bill, S. 3418, introduced in the Senate Committee on Government Operations, provided for both actual and punitive damages for any violation of the Privacy Act. S. 3418, 93d Cong. §304(b) (1974), *reprinted in* Legislative History at 27. The parallel House bill, H.R. 16373, originally provided for actual damages in all cases, with additional punitive damages if the violation was "willful, arbitrary, or capricious." H.R. 16373, 93d Cong. §304(b) (1974), *reprinted in* Legislative History at 250-51. From the outset, Congress recognized that violations of an individual's privacy required compensation beyond actual, out-of-pocket expenses.

After S. 3418 was introduced, the Senate Committee on Government Operations issued a report noting the Committee's intention that a person should have a cause of action for a denial of access, without having to show a particular injury or denial of benefits. S. Rep. No. 93-1183 at 82 (1974), *reprinted in* Legislative History at 235. The Committee also noted that it is often "exceedingly difficult for a citizen . . . to establish a 'cause and effect' relationship

between the information in his file and some subsequent damage to him." *Id.* In addition, the Committee stated that, since the Privacy Act did not grant enforcement authority to any administrative body, the legislation should encourage "the widest possible citizen enforcement through the judicial process." *Id.* at 83, *reprinted in* Legislative History at 236.

The House Committee on Government Operations reported out H.R. 1673 on September 24, but removed the provision on punitive damages. Representatives Abzug, Moss, Stanton, Gude, Burton, Fascell, Culver, Collins, Rosenthal, and Conyers expressed concern about the absence of punitive damages, proposed in the House measure, since "[a]ctual damages resulting from an agency's misconduct will, in most cases, be difficult to prove and this will often preclude an adequate remedy at law." Legislative History at 330. The representatives considered the inclusion of punitive damages, "or, at the very least, *liquidated damages*," to be "essential." *Id* (emphasis added).

Representative Fascell unsuccessfully offered an amendment to essentially restore the original damages language of H.R. 16373. *Id.* at 919. This amendment would have made actual damages available for all violations of the Privacy Act, with punitive damages for willful, arbitrary, or capricious violations. *Id.* at 919-20. Representative McCloskey opposed this amendment. He was concerned about subjecting the United States to potentially limitless punitive damages. *Id.* at 922. Representative Eckhardt pointed out that in the absence of the Fascell amendment, a person who had suffered any amount of actual damage because of the negligence of an agency would be unable to recover. *Id.* The Fascell amendment was ultimately rejected, as it was identical to language rejected by the committee

below. *Id.* at 924.] After additional debate, the bill was passed by the House. *Id.* at 983.

That same day, the Senate considered S. 3418 as reported out by the Committee on Government Operations. *Id.* at 763. The Committee offered several amendments to the bill, which at the time allowed a plaintiff to sue the individual agent responsible for the Privacy Act violation. *Id.* at 768. Instead, the Committee recommended that only the agency be liable, and that the plaintiff should be able to recover both actual and general damages, with a provision for liquidated damages "of say $1,000." *Id.* The bill was thus passed providing for actual and general damages, and the liquidated damages suggestion incorporated as "but in no case shall a person entitled to recovery receive less than the sum of $1,000." *Id.*

The provision in the Act as passed that no person recovering should receive less than $1,000 clearly stems from the Senate Committee's recommendation for liquidated damages—the language is identical.

The Senate reduced the standard of culpability to "willful or intentional," which was thought to be easier for a plaintiff to show than the House's "willful, arbitrary, or capricious," but greater than "gross negligence." *Id.* at 862. The House's language on actual damages was retained, but with the Senate's liquidated damages clause of $1,000. The final measure, agreed to by both houses, provided for liquidated damages where a willful or intentional violation of the Act occurred.

2. Social Security Number

Concerns about the use of the SSN as a universal identifier were prevalent throughout the history of the Privacy Act's passage. The original S. 3418 explicitly made

it unlawful for anyone to require the disclosure or furnishing of an SSN, except as required under the Social Security Act in the administration of benefits. Legislative History at 23. This provision was debated and eventually eliminated during markup. *Id.* at 68.

On September 19, 1974, Senator Goldwater, with Senator Percy, introduced an amendment that, while allowing existing uses of the SSN, prevented its use in future systems. *Id.* at 761. The amendment covered not only government uses, but also prevented "any person" from discriminating against an individual "in the course of any business or commercial activity" because of refusal to disclose the SSN. *Id.* Senator Goldwater's comments touched on two main concerns: first, that individuals would be reduced to their identifying numbers; and second, that this number, linked, could mean that a person would "leave a trail of personal data behind him for all his life which could be immediately reassembled to confront him." *Id.* at 759-60. Senator Percy cited the HEW Report's recommendations in support of this amendment. *Id.* at 762.

This amendment to S. 3418 was considered and accepted by the House on November 21. *Id.* at 804. Prior to the amendment's consideration on the floor, Senator Percy noted the strong connection between the SSN and issues of privacy. *Id.* at 779. He cited an FTC interpretation from 1973 that deemed selling lists of individual credit ratings as violations of the Fair Credit Reporting Act, since they invaded consumers' privacy. *Id.* at 779-80. The FTC opinion continued by saying that though publication of these ratings by name was an invasion of privacy, it would not be an invasion to publish the ratings by SSN. *Id.* at 780. Senator Percy strenuously disagreed with this assessment, noting that the SSN was "widely accessible." *Id.* at 780.

Senator Goldwater later introduced the amendment to S.3418 for consideration. *Id.* at 804. He reiterated his concerns about both the dehumanizing aspects of an identification number, and, more importantly, the ability of government or business to track each person's past records:

> [O]nce we can be identified to the Administrator in government or in business by an exclusive number tied to each of our past activities—our travels, the kinds of library books we have checked out, the hotels we have stayed at, our education record, our magazine subscriptions, our health history, our credit and check transactions—we can be pinpointed wherever we are. We can be manipulated. We can be conditioned. And we can be coerced.

Id. at 805. Senator Percy commented on the increasing computerization of data and records, and how the SSN could become a key to "the indexing and identification of individuals." *Id.* at 807. The amendment was accepted. *Id.*

That same day (November 21), the House considered and accepted a parallel amendment to H.R. 16373. Offered by Representative Goldwater, Jr., the amendment also restored to the bill language excised in committee. *Id.* at 932-33. Like the Senate amendment, it prohibited agencies from denying rights, benefits, or privileges based on an individual's refusal to disclose their SSN. *Id.* at 932. It also did not apply to any systems of records operating prior to 1975. *Id.* However, the House amendment covered only government agencies acting in compliance with federal law or under a federally assisted program, and still allowed the use of the SSN for verification. *Id.* Representative Goldwater

noted the objections to the moratorium on SSN use in the original bill—that altering existing systems based on the SSN would be chaotic and costly—and said that this would not be a problem with the proffered amendment because of its grandfather clause. *Id.* at 933. The amendment to the House bill was accepted. *Id.* at 935.

The differences between the House and Senate versions were resolved informally in a series of compromise amendments that eliminated the authentication exception from the House version and broadened its scope to match the Senate's version, which precluded all government agencies from creating new systems using the SSN. *Id.* at 864. The Senate provision for informing individuals of the nature, authority, and purpose of the request was also included. *Id.* These changes were accepted by the Senate on December 17, and by the House on December 18. *Id.* at 838, 893. The limitations on the use of the SSN were enacted as §7 of the Privacy Act. Pub. L. 93-579, §7.

C. The OMB Guidelines of 1975

In 1975, the OMB issued authoritative regulations for agencies implementing the Privacy Act, pursuant to section 6 of the Privacy Act that also gives the OMB continuing powers to oversee agencies' implementation of the Act. Pub. L. 93-579, §6. Office of Management and Budget, Guidelines for Implementing Section 552a of Title 5 of the United States Code, (1975) ("OMB Guidelines"), reprinted in Legislative History at 1015. Among other things, the OMB Guidelines explicate the civil remedies available to plaintiffs under the Privacy Act. OMB Guidelines at 71.

The OMB Guidelines enumerate three requirements for an individual to sue under subsection (g)(1)(D): the action was "intentional or willful"; the agency's action had an

"adverse effect" upon the individual; and the "adverse effect" was causally related to the agency's actions. *Id.* at 74. Once these criteria are met, the OMB requires no additional showing:

> When the court finds that an agency has acted willfully or intentionally in violation of the Act in such a manner as to have an adverse effect upon the individual, the United States will be required to pay
>
> —actual damages or $1,000, which ever is greater
>
> —court costs and attorney fees.

Id. at 77. This excerpt also indicates the OMB's interpretation of the phrase contained in the Act "but in no case shall a person entitled to recovery receive less than the sum of $1,000." 5 U.S.C. § 552(g)(1)(D), By providing that a plaintiff should receive the greater of actual damages or $1,000 without any additional showing, the OMB Guidelines confirm that a successful plaintiff is entitled to $1,000 as statutory damages.

Congress explicitly delegated to the OMB the task of developing guidelines for the application of the Privacy Act. 5 U.S.C. § 552a(v). The OMB Guidelines clearly provide for statutory damages of $1,000. OMB Guidelines at 77. Since the OMB Guidelines are a reasonable interpretation of a statute that the OMB was charged with overseeing, the court should defer to the agency's interpretation of the statute. *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

CONCLUSION

The willful and intentional disclosure of Social Security Numbers constitutes a substantial invasion of

privacy, as Congress and the courts have recognized. Congress created a liquidated damages provision in the Privacy Act to discourage wrongful disclosures of the SSN. This interpretation is based on the landmark report that provided the basis for the Act, the legislative history of the Act, and the OMB Guidelines that followed the Act.

At a time when identity theft, facilitated by the misuse of the SSN, is on the rise, the Court should ensure that this critical purpose in the Privacy Act is not lost. Requiring high thresholds of proof of actual damages for SSN misuse would undermine public safety and the very purpose of the Act.

Dated: August 25, 2003

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Supreme Court of the United States

BUCK DOE,

Petitioner,

v.

ELAINE L. CHAO, SECRETARY OF LABOR,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF *AMICI CURIAE* LINDA R. TRIPP AND THE NATIONAL WHISTLEBLOWER CENTER IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE AN *AMICI CURIAE* BRIEF

Pursuant to Rule 37(3)(b) of the *Rules of the Supreme Court of the United States* (hereinafter "Rules"), Linda R. Tripp and the National Whistleblower Center (hereinafter "Center") jointly move, by and through counsel, for leave to file an *amici curiae* brief in support of Petitioner in the above-captioned matter.

Pursuant to Rule 37(3)(a) of the Rules, the above-referenced *amici* parties have sought and obtained written consent from all the parties to the case to file an *amici curiae* brief.

Linda R. Tripp is a well-known whistleblower whose rights under the Privacy Act of 1974 were violated in retaliation for exposing wrongdoing by high ranking government officials. Notably, the Defense Department has admitted that it violated the Privacy Act when it intentionally or willfully disclosed, without Ms. Tripp's consent, confidential information about Ms. Tripp from government personnel and security clearance files. Ms. Tripp, who has previously been admitted by the Court as an *amicus curiae*, has a direct and substantial interest in the outcome of this case. *See* Statement of Interest, *infra*.

Additionally, the Center is a nonprofit, non-partisan, tax-exempt, charitable, and educational organization dedicated to the protection of employees who "blow the whistle" and report misconduct in the workplace. As such, the Center, which has also previously been admitted as an *amicus curiae* before this Court, works directly with whistleblowers nationwide who have a direct and substantial interest in the outcome of this case. *See* Statement of interest, *infra*.

By filing an *amici curiae* brief, both Ms. Tripp and the Center strive to help the Court by bringing to its attention relevant matter not already presented to the Court by the parties. For this reason and the reasons stated above, Linda R. Tripp and the National Whistleblower Center jointly request leave to file an *amici curiae* brief in this matter.

Respectfully submitted,

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STATEMENT OF INTEREST OF *AMICI CURIAE* LINDA R. TRIPP AND THE NATIONAL WHISTLEBLOWER CENTER[1]

Linda R. Tripp is a well-known whistleblower who has been subjected to a campaign of retaliation and harassment in response to her reporting of serious misconduct by high-ranking government officials. In retaliation for Ms. Tripp providing evidence to the Office of Independent Counsel, which, *inter alia,* eventually resulted in the impeachment of President Clinton, the Defense Department leaked highly confidential information about Ms. Tripp from government files to discredit and malign her. Notably, the government has officially acknowledged that it violated Ms. Tripp's rights under the Privacy Act of 1974 when the Defense Department wrongfully leaked to the news media confidential information from Ms. Tripp's personnel and security clearance files. *See, Tripp v. Dep't. of Defense,* 219 F.Supp.2d 85, 87 (D.D.C. 2002) ("DOD subsequently conceded liability for the particular disclosure to *The New Yorker* journalist as a violation of the anti-disclosure provision of the Privacy Act, 5 U.S.C. § 552a(b)."). As a result of her whistleblowing activity, Ms. Tripp has experienced harassment and retaliation, including violation of her rights under the Privacy Act, for exposing serious misconduct injurious to the public good. Additionally, in 2002, Ms. Tripp was admitted by this

[1] Pursuant to Rule 37.6, Ms. Tripp and the Center state that no monetary contributions were accepted for the preparation or submission of this *amici curiae* brief and that *amici's* respective counsel, David K. Colapinto, Stephen M. Kohn and Michael D. Kohn, authored this brief in its entirety. Counsel for all parties have consented to the filing of an *amici curiae* brief by Ms. Tripp and the Center.

Court as an *amicus curiae* in *Doyle v. Hydro Nuclear Services, Inc.*, 123 S.Ct. 620 (2002).

The National Whistleblower Center (Center) is a nonprofit, tax-exempt, non-partisan, charitable, and educational organization dedicated to the protection of employees who "blow the whistle" and report misconduct in the workplace. In both the public and private sector, the Center assists employees who have suffered retaliation due to the disclosure of matters in the interest of public health and safety. The Center aids employee whistleblowers who have been involved in environmental protection, nuclear safety, government accountability, and the advocacy of important public policy.

In addition to its involvement in whistleblower litigation, the Center remains active in the education and advocacy of whistleblower protection. The Center sponsors and participates in public education programs and training seminars throughout the country. Furthermore, the Center operates an Attorney Referral Service for whistleblowers (with attorney members in 33 states) and maintains an in-depth and informative Internet web site at www.whistleblowers.org. Since 1990, the Center has participated before this Court as *amicus curiae* in a number of cases that directly impact on the rights of whistleblowers, including, *English v. General Electric*, 496 U.S. 72 (1990); *Haddle v. Garrison*, 525 U.S. 121 (1999); *Vermont Agency of Nat. Resources v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000); *Beck v. Prupis*, 120 S.Ct. 754 (2000); and *EEOC v. Waffle House, Inc.*, 122 S.Ct. 754 (2002).

Persons assisted by the Center have a direct interest in the outcome of this case. The Privacy Act is a key piece of legislation to ensure that the privacy rights of citizens

are protected. It cannot be over-stated how vital avenues of legal redress, including rights available under the Privacy Act, are to those courageous employee-whistleblowers, both actual and potential, who put the public good before their own careers. Protecting the privacy of these individuals is an essential component in encouraging employees to reveal severe abuses of power and dangerous industrial practices. It is surely an incontrovertible fact that, even under the best of circumstances, whistleblowers run enormous career risks. If citizens must, as the Fourth Circuit's decision in *Doe v. Chao* holds, demonstrate actual damages in order to be eligible for the $1,000 statutory minimum damages award, then whistleblowers, like other Privacy Act litigants, face even greater disincentives to expose misconduct or violations of law.

SUMMARY OF THE ARGUMENT

In order to combat the wide-spread government abuse of power and misuse of personal information that existed in the years preceding 1974, Congress created a statutory remedy through the Privacy Act to compensate individuals who fell victim to such "intentional or willful" governmental abuses and deprivation of personal privacy rights. Congress intended to encourage the widest possible citizen enforcement of civil remedies and established a statutory minimum to effectuate the legislative purposes for passing the Privacy Act. In the preamble to the Act, Congress expressly stated that it required all Federal agencies to be subject to suit for "any damages" resulting from "intentional or willful" violations of the Privacy Act. By permitting recovery of a statutory minimum damages award of

$1,000, without further proof of actual damages, Congress intended to provide relief to individuals severely harmed by the government's "intentional or willful" conduct, but who may not have suffered actual damages.

Recognizing that the common-law remedies were not sufficient, Congress established a statutory minimum award of $1,000 where Privacy Act violations were proven. While the Privacy Act provides for awards of actual damages beyond the statutory $1,000 minimum award, the Act does not condition or limit the availability of statutory minimum damages upon an award of actual damages. Unlike plaintiffs seeking damages pursuant to the common law, individuals seeking relief under the Privacy Act may elect the statutory minimum of $1,000 in damages where the evidence may not be sufficient to provide for an award of actual damages. This interpretation of the Privacy Act's statutory minimum damages provision is consistent with and derives from the measure of damages for the common law tort of invasion of privacy.

At common law, a plaintiff that prevails on an invasion of privacy claim is not limited to recovery of emotional distress damages alone, and a prevailing plaintiff is always "entitled" to recover damages for the harm to his or her privacy interests. When the Privacy Act was enacted, Congress was fully aware of the unique rules in invasion of privacy tort cases that recognized the difficulties of proof of damages and which permitted an award of presumed damages to prevailing plaintiffs for humiliation, embarrassment and dignity harms. In order to avoid the situation where a prevailing Privacy Act plaintiff might be awarded a *de minimus* amount of damages, without proof of actual damages, Congress created the statutory minimum of $1,000. The statutory minimum damages reflects

the seriousness with which Congress considered privacy right violations by the federal government in 1974. The offensive harm to the privacy rights of the individual and the societal interests in preventing such further widespread abuses by the federal government compelled Congress to establish a statutory minimum damages award as a result of proving an "intentional or willful" violation of the Privacy Act and an "adverse effect" resulting from that violation.

ARGUMENT

I. THE PRIVACY ACT'S MINIMUM DAMAGES PROVISION IS CONSISTENT WITH AND FULFILLS THE STATUTORY PURPOSES OF THE ACT.

Congress created a statutory remedy to permit the recovery of a statutory minimum level of damages in cases where an individual could prove an "adverse effect" resulting from an "intentional or willful" violation of the Privacy Act. 5 U.S.C. § 552a(g)(1)(D) and (g)(4). The Congressional purpose for enacting the Privacy Act of 1974 was both to encourage "the widest possible citizen enforcement" of the Act's remedial protections, *see,* S. Rep. No. 1183, 93rd Cong., 2d Sess. at 1 & 83, *reprinted in* U.S. Code Cong. & Ad. News at 6916 & 6997 (hereinafter, "USCAN"), *and in Legislative History of the Privacy Act of 1974,* at 154 and 236 (1976) (hereinafter, "*Sourcebook*"); and, by so doing, to redress and prevent serious governmental abuses resulting in the violation of the privacy rights of citizens. *Id.,* USCAN 6916, 6917, *Sourcebook,* at 154-55 (remarks of Sen. Ervin) ("It is designed to prevent the kind of illegal, unwise, overbroad, investigation and record surveillance of

law-abiding citizens produced in recent years from actions of some over-zealous investigators, and the curiosity of some government administrators, or the wrongful disclosure and use, in some cases, of personal files held by Federal agencies.").

At the time the Privacy Act was enacted, Congress was concerned with preventing further government abuses such as "uncontrolled Government surveillance," the FBI's "cointelpro" program, and " . . . sending false and anonymous letters to discredit selected individuals in the eyes of their peers, informing an employer of the individual's membership in a particular group so that the individual might be fired, and passing on information to . . . harm the individual economically." *See Sourcebook* at 793 (remarks of Sen. Muskie).

Among the many concerns cited by members of Congress for enacting the Privacy Act included the "creation of the 'Plumbers,' a White House unit which carried out the break-in at Daniel Ellsberg's psychiatrist's office and engaged in other questionable surveillance activities," illegal "spying secretly conducted by 1500 agents of the U.S. Army on more than 100,000 civilians in the late 1960's," and "secret" and illegal "wire-taps" and selective disclosure or misuse of private information (including information from federal tax returns) for "political purposes," *see Sourcebook* at 795-798 (remarks of Sen. Nelson), and "Watergate and related scandals" that "have brought to light a callous disregard for the law and for the

sanctity of individual rights . . . " *Sourcebook* at 800 (remarks of Sen. Jackson).[2]

Congressional findings set forth in the preamble of the Act expressly provide, *inter alia,* that the "right to privacy is a personal and fundamental right protected by the Constitution." *See* P.L. 93-579, 88 Stat. 1896, the Privacy Act of 1974, Congressional Findings and Purpose § 2(a) (reprinted at 5 U.S.C. § 552a Note).

Congress intended to establish a statutory minimum to effectuate the legislative purposes for passing the Privacy Act. Obviously, Congress considered the widespread government abuse of power and misuse of personal information that existed in the years preceding 1974 and Congress created a statutory remedy through the Privacy Act to compensate individuals who fell victim to such "intentional or willful" governmental abuses and deprivation of personal privacy rights.

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[2] The government's retaliatory action against Ms. Tripp, which the government has admitted was in violation of the Privacy Act, is a modern-day example of the type of government abuse the Privacy Act was intended to combat. *See, Tripp v. Dep't. of Defense,* 219 F.Supp.2d 85, 87 (D.D.C. 2002) (noting that government conceded Privacy Act violation). The "scheme to defame and destroy the public image of Linda Tripp with the intent to influence, obstruct, and impede the conduct and outcome of pending investigations and prosecutions" is nearly identical to the action taken by Charles Colson and the "Plumbers" against Daniel Ellsberg to influence and impede pending investigations. *See* 106 Cong. Rec. S4939 (Sen. daily ed. June 12, 2000) (remarks of Sen. Inhofe). The government's admitted violation of the Privacy Act as a means to discredit Ms. Tripp demonstrates how the government still misuses information in reprisal against whistleblowers and for political purposes.

That statutory minimum damages are separately recoverable from "actual damages" under the Privacy Act is fully consistent with the purposes of the Act and other provisions of the Act.[3] Significantly, the Privacy Act's preamble specifically waives sovereign immunity "by requiring Federal agencies" to "be subject to civil suit for *any* damages which occur as a result of willful or intentional action which violates any individual's rights under this Act." *See* P.L. 93-579, 88 Stat. 1896, Congressional Findings and Purpose § 2(b)(6) (reprinted in 5 U.S.C. § 552a Note) (emphasis added). *Also see, Johnson v. Dept. of Treasury, Internal Revenue Serv.*, 700 F.2d 971, 975 (5th Cir. 1983) (noting preamble). Surely, the Privacy Act's statutory minimum damages are a type of "*any* damages" for which suit has been expressly consented as stated in the Act's preamble.

Indeed, the recovery of the statutory minimum damages are often the only kind of damages available to a prevailing Privacy Act plaintiff. Permitting recovery of a statutory minimum award of $1,000 affords relief to those severely harmed by the government's "intentional or willful" conduct, but who may not have suffered actual damages. *See Wilborn v. Dept. of Health & Human Serv.*, 49 F.3d 597, 603 (9th Cir. 1995), *citing Fitzpatrick v. IRS*, 665 F.2d 327, 330 (11th Cir. 1982) (purpose of minimum damage provision is to give those with "no provable damages" the incentive to sue). In order to avoid the absurd

[3] *See also, Parks v. United States Internal Revenue Serv.*, 618 F.2d 677, 683 n2 (10th Cir. 1980) (finding that "[t]he grant of a cause of action to any 'aggrieved person' is designed to encourage the widest possible citizen enforcement through the judicial process").

result of Privacy Act plaintiffs proving a violation but having no remedy, Congress created a statutory minimum and required that all Federal agencies be subject to suit and liable for at least the $1,000 minimum damages.

However, a restrictive interpretation of the Act, as Respondent urges, that limits statutory minimum damages upon a recovery of actual damages "would frustrate the purposes of the civil remedy" and enforcement provisions because litigants who prove intentional or willful violations of the Act would frequently be left without any remedy, and "an inadequate recovery would reduce both the deterrent impact on the government and the incentives for citizen enforcement." *See* 52 *Fordham L. Rev.* 611, 622, "Damages Under the Privacy Act of 1974: Compensation and Deterrence," *citing Johnson, supra.*, 700 F.2d at 977.

More significantly, the narrow interpretation adopted by the Fourth Circuit in this case is also at odds with the express statement of Congressional purpose in the Privacy Act preamble that sovereign immunity was waived with respect to claims for "*any* damages" arising from a violation of the Act. *See* P.L. 93-579, 88 Stat. 1896, Congressional Findings and Purpose § 2(b)(6) (reprinted in 5 U.S.C. § 552a Note) (emphasis added).

As a practical matter, the Fourth Circuit's narrow interpretation of section (g)(4) of the Act that requires a prevailing plaintiff to prove substantial "actual damages" before being eligible for the $1,000 minimum statutory damages would effectively eliminate altogether the statutory minimum. It is highly unlikely Congress created the statutory minimum to apply only in cases where "actual damages" were proven, because if a plaintiff were able to

prove such damages the award would likely exceed the $1,000 threshold, thus rendering the statutory minimum a needless surplusage.

The Privacy Act, the preamble to the Act, and the legislative history of the Act, repeatedly emphasize the importance of protecting personal privacy as a fundamental and constitutional right, and reflect a strong intent that the civil remedies and enforcement provisions further the Act's compensatory and deterrent goals. The Act's preamble expressly requires that "*any* damages" be awarded when a Privacy Act violation is proven. *See* P.L. 93-579, § 2(b)(6) (reprinted in 5 U.S.C. § 552a Note) (emphasis added). It is only by permitting the recovery of statutory minimum damages in Privacy Act cases, without requiring additional proof of "actual damages," that the Act's statutory purposes can be fulfilled.

II. THE AVAILABILITY OF MINIMUM STATUTORY DAMAGES IS NOT LIMITED BY ACTUAL DAMAGES.

Unquestionably, Congress "borrowed from the common law in designing the remedy provision" of the Privacy Act. *See Johnson, supra.*, 700 F.2d at 977. *Accord.*, *Parks, supra.*, 618 F.2d at 683 ("It appears from the Act that Congress was borrowing from the common law tort of invasion of privacy.").

Congressional reliance on the common law invasion of privacy tort is also reflected throughout the Privacy Act's legislative history. *See Sourcebook* at 769 (remarks of Sen. Ervin) (the Act implements "those recognized values of Western jurisprudence and democratic constitutional government" and "they are the principles upon which our own

Constitution rests"); *Id.*, at 784 (remarks of Sen. Muskie) ("The Federal Privacy Act draws upon the constitutional and judicial recognition accorded to the right of privacy and translates it into a system of procedural and substantive safeguards against obtrusive Government information gathering practices."); *Id.*, at 803 (remarks of Sen. Goldwater) ("By privacy, I mean . . . the right to be protected against disclosure of information given by an individual in circumstances of confidence, and against disclosure of irrelevant embarrassing facts relating to one's own private life . . . " and "what the U.S. Supreme Court has referred to as the embodiment of 'our respect for the inviolability of the human personality,' and as a right which is 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.' ").

At common law, a prevailing plaintiff who proved an invasion of privacy tort could collect general or presumed damages. Thus, entitlement to the statutory minimum damages under the Privacy Act, without additional proof of actual damages, is fully consistent with the measure of damages for the common law tort of invasion of privacy.

A plaintiff that prevails on an invasion of privacy claim "is entitled to recover damages for (a) the harm to his interest in privacy resulting from the invasion; (b) his mental distress proved to have been suffered if it is of a kind that normally results from such an invasion; and (c) special damage . . . " *Restatement (Second) of Torts*, § 652H. However, damages at common law are not limited to recovery to emotional distress damages alone, and a prevailing plaintiff is always "entitled" to separately recover damages for the harm to his privacy interests. *Id.*

It has long been recognized that presumed damages are always available to compensate for the invasion itself of the privacy interest. *See* 2 Dobbs, *Law of Remedies,* § 7.3(4) at 316-317 (1993). As one court noted:

> The fact that damages resulting from an invasion of the right of privacy cannot be measured by a pecuniary standard is not a bar to recovery. While special damages may be recovered if sustained, general damages may be recovered *without a showing of specific loss.*

Fairfield v. American Photocopy Equip. Co., 138 Cal. App. 2d 82, 291 P.2d 194, 198 (1955) (emphasis added).

The common law rule permitting recovery of general or presumed damages in invasion of privacy tort cases continues to be followed by the courts. *See Hayes v. Alfred A. Knopf, Inc.,* 8 F.3d 1222 (7th Cir. 1993) ("the nature of the injury shows . . . that the defendants are wrong to argue that this branch of the right of privacy requires proof of special damages"); *Nolley v. County of Erie,* 802 F. Supp. 898, 903, 905 (W.D.N.Y. 1992), *set aside on other grounds, on remand,* 798 F. Supp. 123 (W.D.N.Y. 1992) (presumed damages available for privacy action based on unwarranted disclosure of plaintiff's HIV status); *Snakenberg v. Hartford Casualty Ins. Co.,* 299 S.C. 164, 172, 383 S.E.2d 2, 6 (Ct. App. 1989) (held that if a plaintiff proves liability of the defendant for an intrusion then "the fact of damage is established as a matter of law"); *Rumbauskas v. Cantor,* 266 N.J. Super. 399, 629 A.2d 1359, 1361-62 (App. Div. 1993), *cert. granted,* 134 N.J. 565, 636 A.2d 522 *and rev'd on other grounds,* 138 N.J. 173, 649 A.2d 853 (1993) (harm under § 652H does not require emotional distress or physical injury); *K-Mart Corp. Store No. 7441 v. Trotti,* 677 S.W.2d 632, 638-40 (Tex. App. Houston 1st Dist. 1984) ("This intrusion itself is actionable.").

A similar approach was taken to determine the appropriate measure of damages for invasion of privacy to victims of the government's illegal domestic mail opening program. *See Birnbaum v. United States,* 436 F.Supp. 967, 987-989 (E.D.N.Y. 1977). In *Birnbaum,* the court found that the Central Intelligence Agency ("CIA") violated the plaintiffs' common law privacy rights as a result of the CIA's mail opening program that took place between 1953-1973, and awarded each plaintiff the sum of $1,000 in damages under the Federal Tort Claims Act ("FTCA"). *Id.*[4] In reaching the $1,000 per plaintiff damages award the court expressly noted that the "lack of objective harm" is "no bar to recovery" and that such awards are appropriate to compensate for "the injury of invasion itself." *Id., citing Restatement (Second) of Torts,* § 652H. Notably, the court observed that "a deprivation of common law privacy is *an independent injury for which damages are appropriate.*" *Id.,* 436 F.Supp. at 987 (emphasis added).

In another FTCA case, where there was no evidence of emotional distress damages presented, the court held that a political organization was "entitled to recover for the harm to its interest in privacy" as a result of the invasion of privacy from the "193 burglaries" of its offices committed by the Federal Bureau of Investigation ("FBI") over a ten-year period. *See Socialist Workers Party v. Attorney*

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[4] On appeal, the Second Circuit affirmed the district court's $1,000 per plaintiff damages award under the FTCA, but reversed an order requiring the CIA to issue letters of apology to each plaintiff. *See Birnbaum v. United States,* 588 F.2d 319 (2d Cir. 1978).

General, 642 F.Supp. 1357, 1422 (S.D.N.Y. 1986), *citing Restatement (Second) of Torts,* § 652H. In awarding damages for invasion of privacy, the court "put a value of $500 on the harm to the SWP's privacy interest" for each of the 193 burglaries by the FBI, resulting in a total damages award of $96,500. *Id.*

When the Privacy Act was enacted in 1974, the term "actual damages" was defined as "synonymous with" the terms "compensatory damages" and "general damages." *See, e.g., Black's Law Dictionary,* at 467 (4th Ed. 1968). That definition remains the case today. *See, e.g., Mellinkoff's Dictionary of American Legal Usage,* at 147-148 (Defining "actual damages" as "compensatory damages" and including "general damages" as part of "actual damages"). *Also see, Law Dictionary,* at 124-125 (Barron's 4th ed.) (Defining "general damages" and "compensatory damages" as "actual damages").[5] Without question, "general damages" are considered to include "presumed damages." *See Modern Legal Usage,* at 382 (Oxford Univ. Press, 2d Ed. 1995). Accordingly, when Congress used the term "actual damages" in the Privacy Act it incorporated the prevailing common law definition that "actual damages" included "general damages" and "presumed damages."[6]

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[5] *Accord., Restatement (Second) of Torts,* § 621 ("General damages are a form of compensatory damages.").

[6] Congress is "presumed to know the law." *See Cannon v. University of Chicago,* 441 U.S. 677, 696-99, 99 S.Ct. 1946 (1979). *Also see,* 2B, Singer, *Sutherland Statutory Construction,* § 50:03, p. 150 (6th Ed. 2001) ("The interpretation of well-defined words and phrases in the common law carries over to statutes dealing with the same or similar subject matter.").

This interpretation of the term "actual damages" is required to effectuate the Privacy Act's purposes for the same reasons as stated in Section I, *supra. Also see,* 3, Singer, *Sutherland Statutory Construction,* § 60:1, p. 183 (6th Ed. 2001) (remedial legislation should be broadly construed to effectuate the purpose for which it was enacted).[7] Likewise, for the same reasons, Privacy Act plaintiffs should be able to pursue "actual damages" for emotional distress and other non-pecuniary harm.[8]

Significantly, Congress modified the common law negligence standard for recovery of damages for invasion of privacy by conditioning recovery of any damages under the Privacy Act subject to proof of a violation pursuant to the "intentional or willful" standard. 5 U.S.C. § 552a(g)(4). A plaintiff may satisfy this heightened standard by showing the agency held a reckless or conscious disregard for

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[7] Given the availability of "general" or "presumed" damages as part of "actual damages" at common law, the Privacy Act's incorporation of "actual damages" as part of the statutory remedy also means that a prevailing Privacy Act plaintiff would be entitled to the statutory minimum award without proof of substantial emotional distress. Accordingly, even if the Privacy Act is interpreted to require "actual damages" as a prerequisite to obtaining the statutory minimum award, a plaintiff must still be permitted to obtain "general" or "presumed" damages that are available as "actual damages" at common law. In other words, the availability of statutory minimum damages under the Privacy Act is fully consistent with and derives from the common law definition of "actual damages," which includes "general" or "presumed" damages.

[8] *See Johnson, supra.,* 700 F.2d at 977; *Parks, supra.,* 618 F.2d at 683. Under the common law, damages for emotional distress are unquestionably available for invasion of privacy. *See Time, Inc. v. Hill,* 385 U.S. 374, 386 n9, 87 S.Ct. 534 (1967); *Restatement (Second) of Torts,* § 652H.

the plaintiff's rights under the Privacy Act. *See Waters v. Thornburgh*, 888 F.2d 870, 875 (D.C. Cir. 1989), *quoting Albright v. United States*, 732 F.2d 181, 189 (D.C. Cir. 1984) (liability found when agency acts "without grounds for believing it to be lawful, or by flagrantly disregarding others' rights under the Act"). The heightened standard of proof was no accident and was the subject of debate at the time of enactment. *See Sourcebook*, at 925-29. By codifying this heightened standard of proof, Congress narrowly tailored the Privacy Act's statutory minimum damages "with reference to the nature of the interests protected by" the Act. *See Carey v. Piphus*, 435 U.S. 247, 265, 98 S.Ct. 1042, 1052 (1978). In so doing, Congress balanced the interests sought to be protected by the Privacy Act against other legitimate interests in limiting the recovery of any damages to those cases where invasions of privacy by the government were proven under the "intentional or willful" standard.

Allowing Privacy Act plaintiffs to opt for statutory minimum awards without further proof of actual damages will also encourage citizen enforcement of the Act's civil remedy provisions, because the costly and time-consuming process of proving emotional distress or other types of intangible damages can be avoided. As one commentator has noted:

> The irony of legal redress for mental suffering is that plaintiffs are forced, first in a deposition and again at trial, to testify and be cross-examined on intimate and embarrassing personal details such as humiliation, indignity, nasty jokes by acquaintances, sleepless nights, sexual impotency, mental imbalance causing fights with spouses and friends, inability to perform on the job, psychiatric care and the like. Testifying in court about such matters is itself a grueling experience. Perhaps these brutal realities are the reason few people sue for emotional injuries in a court of law.

Vol. 2, McCarthy, *The Rights of Publicity and Privacy*, § 11:26, pp. 11-55 (West 2000).[9]

Recognizing that the common-law remedies were not sufficient, Congress established a statutory minimum award of $1,000 where Privacy Act violations were proven. In addition, the Privacy Act provides for awards of substantial actual damages beyond the statutory $1,000 minimum award. Notably, Congress did not cap damages. However, the statutory minimum damages in the amount of $1,000 reflects the seriousness with which Congress considered privacy right violations by the federal government in 1974. The severity of harm to the privacy rights of the individual, and the societal interests in preventing such abuses by the federal government, warranted establishing a statutory minimum of $1,000 as a result of proving a violation of the Act. Similar to plaintiffs seeking presumed damages pursuant to the common law, individuals

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[9] *Id., citing, Olan Mills, Inc. of Texas v. Dodd*, 353 S.W.2d 22, 23 (Ark. 1962) (Where, in order to recover $2500 for the unpermitted use of her photo in an advertisement, plaintiff had to testify that: "I hadn't given anybody permission to use my picture. It caused me a lot of humiliation and embarrassment. I have heard remarks on the street when I was passing, people saying, 'I never thought Mrs. Dodd would permit her picture to be used for advertising,' and things like that. I can't sleep."); and *Fairfield, supra.*, 158 Cal. App. 2d at 56 (Where an attorney, in order to recover $1500 for use of his name in advertising a copying machine, had to testify that: "I felt humiliated, embarrassed, chagrined. I was worried, sick. Not sick, scared. And I felt pretty cheap.").

seeking relief under the Privacy Act damages provision may elect the statutory minimum of $1,000 in damages where the evidence may not be sufficient to provide for an award of actual damages. This interpretation of the Privacy Act's statutory minimum damages provision fulfills the legislative goal and purposes underlying the Act and is consistent with the common law rules governing damages for invasion of privacy.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Fourth Circuit Court of Appeals.

Respectfully submitted,

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Supreme Court of the United States

BUCK DOE, ET AL.,
Petitioners,
v.
CHAO, SECRETARY OF LABOR,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The Reporters Committee's interest in this case is in preserving the uninhibited exchange of information and access to federal government records. The Reporters Committee submits this brief in support of the government's argument that Section 552a(g)(4) of the Privacy Act of 1974, 5 U.S.C. § 552a ("Privacy Act" or "Act"), requires a plaintiff claiming violation of the Act to prove "actual damages" in order to collect the statutory minimum award of $1,000.

SUMMARY OF THE ARGUMENT

The Reporters Committee for Freedom of the Press supports the government's interpretation of the "actual damages" provision in the Privacy Act of 1974. *See* 5 U.S.C. § 552a(g)(4).

It is in the interest of the public to encourage, rather than restrict, the truthful exchange of information, especially when such information is not stigmatizing. Congress enacted the Privacy Act with the principle of open government in mind. It created the Privacy Act in tandem with amendments to the

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[1] Pursuant to Sup. Ct. R. 37.6, counsel for *amicus curiae* declare that they authored this brief in total with no assistance from the parties. Additionally, no individuals or organizations other than the *amicus* made a monetary contribution to the preparation and submission of this brief. Written consent of all parties to the filing of the brief *amicus curiae* has been filed with the Clerk pursuant to Sup. Ct. R. 37.3(a).

Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), intended to make clear that the public is entitled to see government information except when narrowly drawn exemptions apply. In that context, Congress was careful to craft a privacy statute that deferred to openness. It included an exemption from Privacy Act closure for information required to be released under the FOIA, and it provided that, even when the government might mishandle information about individuals, they could recover damages only when the error was intentional and when the mishandling caused actual harm. The civil remedies provisions in the Act are therefore intentionally, and rightfully, stringent.

The government's position — that a person must prove actual damages in order to recover any damages under the Act — strikes the correct balance between the aims of the Act and the overarching goal of unrestricted flow of government information. The public will benefit from an interpretation of the civil remedies provision that penalizes disclosure of Privacy Act information only when actual harm occurs and that does not put a chill on the government's willingness to allow the exchange of such information.

ARGUMENT

I. The federal information laws encourage the free exchange of non-stigmatizing information.

The federal government's information policy is rooted in two statutes: the FOIA and the Privacy Act. The two acts complement each other and work together to form a comprehensive scheme of information disclosure. The overarching aim of the two statutes is simple: providing the public with information from government, while keeping private personal information the release of which could harm individuals. *See Cochran v. United States,* 770 F.2d 949, 954 (11th Cir. 1985)

(although they have seemingly contradictory purposes, the two acts work together to balance privacy interests against a strong public policy in favor of public access to government information); *Greentree v. U.S. Customs Serv.*, 674 F.2d 74, 77 (D.C. Cir. 1982) ("Both FOIA and the Privacy Act evidence Congressional concern with open government, and especially, access to government records").

The Privacy Act was created in 1974 with the limited purpose of curtailing the government's ability to secretly amass and control information on individuals. In the wake of the Watergate hearings, Congress was concerned that the government could collect information about individuals and use it to their detriment without their knowledge. An impetus for the Act was the concern that encroaching computer technology would give rise to data systems capable of gathering vast amounts of information. Legislative history of the Act cites fears of secret government computer surveillance and "a dictatorship of data banks." S. Rep. No. 93-1183, 1974 U.S.C.C.A.N. 6916, 6922 (1974).[2]

Although the Act creates rules for the collection and nondisclosure of certain harmful information, transparency in government was important to the legislators who created the Act. The Senate Report on the bill that became the Privacy

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[2] "[The Act] is designed to prevent the kind of illegal, unwise, overbroad, investigation and record surveillance of law-abiding citizens produced in recent years from actions of some overzealous investigators, and the curiosity of some government administrators, or the wrongful disclosure and use, in some cases, of personal files held by Federal agencies. It is to prevent the secret gathering of information on people or the creation of secret information systems ..." S. Rep. No. 93-1183, 1974 U.S.C.C.A.N. at 6916-17. *See also Cochran*, 770 F.2d at 954 ("Congress was chiefly concerned with the potential for misuse of enormous amounts of personal information collected by government agencies ... and stored in computers").

Act cites as one main purpose of the Act the promotion of "accountability, responsibility, legislative oversight, *and open government* with respect to the use of computer technology in the personal information systems and data banks of the Federal Government and with respect to all of its other manual or mechanized files." S. Rep. No. 93-1183, 1974 U.S.C.C.A.N. at 6916 (emphasis added). The Report states: "[T]he Committee[3] does not wish to defeat the purposes of the Federal Reports Act to *promote the efficient, economical exchange and sharing of information*; nor does it wish to impose undue burdens on individuals from whom information is solicited." *Id.* at 6962 (emphasis added). The legislators who created the Act envisioned a "conscientious weighing of the interests by the administrators." *Id.*

To ensure that the goals of open government and free information exchange would not be lost when the Privacy Act took effect, Congress added Section 552a(b)(2) — the FOIA exception — to the Act. That section makes clear that the Privacy Act never prohibits public disclosure of information that is required to be released under FOIA. *See, e.g., Jafari v. Department of the Navy*, 728 F.2d 247 (4th Cir. 1984). According to the legislative history of the Act:

> This provision was included to meet the objections of press and media representatives that the statutory right of access to public records and the right to disclosure of government information might be defeated if such restrictions [Privacy Act prohibitions on disclosure] were to be placed on the public and press. The Committee believed it would be unreasonable and contrary

[3]References to the "Committee" are to Senate's Committee on Government Operations, which reported in September 1974 to the Senate on the Privacy Act bill. S. Rep. No. 93-1184, 1974 U.S.C.C.A.N. 6916.

> to the spirit of the Freedom of Information Act to attempt to keep an accounting of the nature and purpose of access and disclosures involving the press and public or to impose guarantees of security and confidentiality on the data they acquire.

S. Rep. No. 93-1183, 1974 U.S.C.C.A.N. at 6985. The FOIA exception was "designed to preserve the status quo" regarding disclosure of information under FOIA. *Cochran*, 770 F.2d at 955 n.7. Its inclusion in the Privacy Act is clear evidence of Congress's intent to create a statutory scheme in which open government remains a top priority. *See id.* at 955 ("If the balance is equal the court should tilt the balance in favor of disclosure"); *Greentree*, 674 F.2d at 79 ("[S]ection (b)(2) of the Privacy Act represents a Congressional mandate that the Privacy Act not be used as a barrier to FOIA access").

II. Privacy Act enforcement actions were intended to be — and should be — limited in scope, so that government employees are not chilled from making appropriate decisions to release harmless information not protected by the Act

Because the Privacy Act has a limited purpose and is meant to accommodate the goal of open government, its civil remedies provisions are, and should be, stringent.

The Act's drafters intentionally limited the availability of civil relief by requiring Privacy Act claimants to submit a high level of proof that they had suffered harm. Congress's decision to condition damages on proof of "actual damages" is similar to its requirement that plaintiffs claiming improper release of information demonstrate that the government acted "intentionally" or "willfully." 5 U.S.C. § 552a(g)(1), -(4). Courts across the country have recognized that the "intentional or willful" standard of culpability is high. *See, e.g.,*

Scrimgeour v. Internal Revenue, 149 F.3d 318, 326 (4th Cir. 1998); *Andrews v. Veterans Admin.*, 838 F.2d 418,424-25 (10th Cir. 1988); *Laningham v. U.S. Navy*, 813 F.2d 1236, 1242-43 (D.C. Cir. 1987). Congress made sure that agencies whose employees acted without a high level of intent would not be hindered by lawsuits imposing civil penalties. *See, e.g., Pippinger v. Rubin*, 129 F.3d 519, 530 (10th Cir. 1997); *Sullivan v. Veterans Admin.*, 617 F. Supp. 258, 261-62 (D.D.C. 1985).

Appellant Buck Doe's interpretation of the damages provision in the Act — that anyone who has suffered "adverse harm" is entitled to the minimum award of $1,000, without proof of "actual damages" — goes against Congress's intent to limit the government's liability. Requiring a minimum damages award for each and every violation of the Act, regardless of proof of harm, would impose the threat of a large, unintended burden on government agencies. The constant threat of damages would chill government actors from releasing information that can and should be released under the FOIA and the Privacy Act. Faced with practically automatic penalties, government employees would likely withhold more information than is required under the law. Fear of damages would put the government on the defensive and make nondisclosure of information its default — a position that is clearly at odds with this country's information policy.[4]

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[4]The FOIA, the Privacy Act's sister statute, similarly levies only very limited penalties for failure to abide by its disclosure rules and provides no compensation at all for damages a requester may suffer because of unlawful denials. *See, e.g., Stabasefski v. United States*, 919 F. Supp. 1570, 1573 (M.D. Ga. 1996) (remedial measures under the FOIA are limited to injunctive relief, costs and attorneys fees, presumably because Congress did not want agencies to be inundated (continued...)

The news media recognize that civil remedies against the government for disclosure of harmful information in certain instances are proper. Nevertheless, it is vital to the press in its role as public watchdog that government actors be encouraged to release as much information as possible under the federal information laws.[5] *See N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978); *Department of the Air Force v. Rose*, 425 U.S. 352, 360 (1976). The Reporters Committee for Freedom of the Press believes that the interpretation that the government advocates in this litigation — that an agency need not pay damages where actual harm has not been proven — is in line with goals of the Privacy Act and the FOIA to allow for uninhibited exchange of harmless information and to prevent a chill on legal disclosures made by government officials.

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[4](...continued)
with costs); *see also* 5 U.S.C. § 552(a)(4)(F) (under certain narrowly prescribed circumstances, an agency employee who arbitrarily or capriciously withholds information may be subject to disciplinary action).

[5]Of particular importance to the press is the ability of whistleblowers from government to inform the press and public about governmental operations. The drafters of Privacy Act intended that the law be interpreted in a way that does not chill whistleblowers from speaking out about issues of public importance. *See* S. Rep. No. 93-1183, 1974 U.S.C.C.A.N. at 6942 (explaining that stronger criminal penalty provisions were eliminated from a draft of the Act because of "the possibility that the threat of prosecution may preclude that 'Whistleblowing' and disclosure of wrongdoing to Congress and the press which helps to promote 'open government'"); *see also id.* at 6954 (it was important to Congress that whistleblowers receive immunity under the criminal code).

CONCLUSION

The Reporters Committee for Freedom of the Press respectfully asks the Court to take into consideration this country's information policy as a whole, with its goals of open government and free exchange of information, in its interpretation of the "actual damages" provision of the Privacy Act. In doing so, the Court should find in favor of the Respondent and hold that an individual who has proven a violation under the Act may not recover the statutory minimum of $1,000 without additional proof of "actual damages."

Respectfully submitted,

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